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INTRODUCTION

Should the state or the national government have the primary responsibility to protect civil liberties? The debate on this question dates from the time of our founding. It is clear that the framers of the Constitution intended to leave the responsibility of dealing with questions of religion, morals, and values primarily to the states. Yet, history shows that the federal judiciary has largely appropriated this authority. This development was endorsed in 1951 by one commentator who, oddly enough, lamented the lack of assertiveness of the United States Supreme Court. He urged that the Court become a more reliable retreat for those who sought protection for their liberties, as these rights were too precious to "become matters for state experimentation."[1] However, it is currently suggested that we have witnessed a full turn of the circle in civil liberties history. While the Warren Court aggressively undertook the protection of civil rights,[2] some criticize the Burger and Rehnquist Courts for being unsympathetic in protecting these rights.[3] In the face of what may appear to be the inconsistency of the federal judiciary, the question necessarily arises: What is the legitimate role of the states in civil liberties protection?

More specifically, what is the role of the states regarding religious liberties and freedom of conscience? If the federal courts are unreliable, is there potential for the development of an independent jurisprudence of state constitutional law in these areas? This article analyzes some of the major issues raised by the religious freedom provisions of the United States Constitution, including judicial decisions and commentary interpreting these provisions. The approach is topical, but will not attempt to be an exhaustive re-

1. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951). Contrast Paulsen's view with the quote and text accompanying note 152 in which Jefferson specifically stated that matters such as religion were no business of the national government.

2. Mosk, *State Constitutionalism After Warren: Avoiding the Potomac's Ebb and Flow*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, 201 (1985). Mosk states, "Under Chief Justice Warren and his merry men, the court abandoned an apathetic approach to overt injustice in society and elected to employ the federal Constitution to achieve a liberating and egalitarian impact in the areas of political opportunity, criminal justice, and racial equality." *Id.* at 201-02.

3. Greenhalgh, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Bill of Rights*, in DEVELOPMENTS IN STATE CONSITUTIONAL LAW 239 (1985). Grenhalgh states: "The Supreme Court's last ten years have been marked most profoundly by a retrenchment of individual rights, particularly Fourth, Fifth and Sixth amendment federal constitutional guarantees to those accused of criminal offenses." *Id.* at 211.

view of the federal decisions. As an example of a state court's approach to these issues, we will then consider analogous provisions of the Georgia Constitution, as well as judicial decisions and commentary relating to these provisions. Additionally, a review of some comparable provisions and experiences in other states is helpful for general comparison of state and federal approaches to religious freedom issues.

We will find an almost unreconcilable dichotomy between the state and federal roles in the maintenance of religious liberty. This overview of the underlying differences in approach between the states and the United States Supreme Court will touch on some of the philosophical and historical developments of the law in this area. We will see that independent state constitutional jurisprudence in matters of religious liberty is nearly impossible. Further, this overview will show the need for religious liberty jurisprudence to develop a more accurate historical base derived from the original intent of the federal constitutional provisions.

Review of a leading Georgia case and a major decision of the United States Supreme Court will illustrate the contrast between the state and federal approaches and highlight two distinct views of protecting religious liberty. In each case, the court dealt with the question of the intent of the framers of the Constitution, yet each court reached different conclusions. In *Wilkerson v. City of Rome*,[4] the Georgia Supreme Court considered a constitutional challenge to an ordinance of the city of Rome which required the board of education to have daily Bible reading and prayer in the public schools. Noting that no previous reported case in Georgia offered guidance, the court examined the source of the constitutional provisions at issue in an effort to determine the intent behind these provisions.[5] After reviewing the historical sources, the court found that the religious exercises required by the ordinance did not circumvent the intent of the framers to protect religious liberties[6] and prohibit the establishment of any religious sect.[7]

Conversely, a consideration of the same historical intent led the United States Supreme Court, in *School District of Abington Township v. Schempp*,[8] to the opposite conclusion. In *Schempp*, the Court held that daily Bible reading and recitation of the Lord's

4. 152 Ga. 762, 110 S.E. 895 (1922).
5. *Wilkerson*, 152 Ga. at 766-72, 110 S.E. at 897-900.
6. *Id.* at 772-73, 110 S.E. at 901.
7. *Id.* at 777-78, 110 S.E. at 902-03.
8. 374 U.S. 203 (1963).

Prayer, as required by a Pennsylvania township ordinance, constituted an establishment of religion in violation of the first amendment, as applied to the states through the fourteenth amendment. Thus, an issue that had previously been resolved at the state level in 1922, became, in 1963, a federal constitutional issue for the Supreme Court to resolve. These cases differ both in result and in the philosophical approaches which each court used in analyzing the specific provisions at issue. The United States Supreme Court's approach is illustrated in Justice Brennan's concurring opinion in *Schempp*, in which he discussed the relevance of the framers' intent.[9]

> [A]n awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems. . . . But I doubt that their view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases. A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared . . . .
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> ....
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> A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, . . . the historical record is at best ambiguous, ...
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> Second, the structure of American education has greatly changed . . . .
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> Third, our religious composition makes us a vastly more diverse people than were our forefathers. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.[10]

In contrast, the Georgia court in *Wilkerson* arduously researched source documents and historical references to determine the intent behind the religious liberty provisions before the court.[11] Thus, these two cases represent different perspectives of the law dealing with the value of intent, the role of the judge in society, and the

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9. "The role of the Supreme Court in the interpretation of the First Amendment's religion clauses is of recent origin. It is a development of the last half-century . . . ." P. KURLAND, CHURCH AND STATE, THE SUPREME COURT AND THE FIRST AMENDMENT at xi (1975).

10. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 234-41 (1963) (Brennan, J., concurring).

11. Wilkerson v. City of Rome, 152 Ga. 762, 766-72, 110 S.E. 895, 897-900 (1922).

authority of the states in the federal system. In short, the opinions are based on divergent epistemological foundations. These distinctions will be amplified as we proceed with our analysis of religious liberty in the context of both national and state jurisdictions.

In conclusion, we will see that federal judicial preemption of religious liberty law effectively prevents the development of an independent jurisprudence in this area of the law in most states. This preclusion is particularly apparent with issues relating to the establishment clause. The United States Supreme Court has interpreted the establishment clause so broadly that very few states would desire to expand establishment concepts further. Rather, many states desire to diminish establishment clause applications, but find they are prevented from doing so by United States Supreme Court interpretations. On the other hand, the Court has left little room for expansion of free exercise concepts, by finding that free exercise rights generally must yield to establishment clause concerns.

I. Religious Clauses of the First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .[12]

A. Cases and Concepts

One consequence of the United States Supreme Court's religious liberty jurisprudence is that the Court has effectively assumed the task of determining the role of religion in our society. Is this a desirable result, or should the legislature determine this issue, since it is the branch of government designated to formulate public policy? In exercising its authority to decide first amendment religious liberty cases, what has the Court declaimed is the proper role of religion in a free society? Indeed, what has the Court said of religion itself? In order to address these questions, we will need to consider those cases involving the role of religion in society and the extent of the Court's jurisdiction in this area. We will follow a topical approach as we pursue answers to these questions. In an attempt to see the constitutional provisions as expressions of fundamental concepts, we will look at the decisions of the Court not only from the perspective of the judiciary, but also from that of the reli-

12. U.S. Const. amend. I.

gions, the intended beneficiaries of the liberties. Such an approach will include examining the current first amendment issues and decisions that provide examples of the analytical methodology and the underlying epistemological framework of the Court's pronouncements on religion in the United States.

The principal topical categories will be: a conception of freedom and liberty, the definition of religion, and the role of religion in public education. In discussing each of these topics, we will contrast the apparent intent of the framers of the Constitution with the modern interpretations of the free exercise and establishment clauses of the first amendment.

B. What is Freedom and What is Liberty?

Theoretically at least, the purpose of the "absorption" of the first amendment freedoms by the fourteenth amendment (the incorporation doctrine) was to broaden the protection of the liberties or freedoms secured by the first amendment. It is not possible to determine the success or failure of this expansive approach unless the freedoms to be secured are defined. The Liberty Bell, in Independence Hall, is inscribed with the message: "Proclaim liberty throughout all the land unto all the inhabitants thereof . . . ." This inscription is a quote from *Leviticus* 25:10. Do our concepts of liberty and freedom have a religious foundation? Where do we look for the foundation and the definition of such fundamental concepts?

It is not a sufficient answer simply to accept the view of former Chief Justice Charles Evans Hughes that "the Constitution is what the judges say it is."[13] An acceptance of his view results only in blind conformity. Religious freedoms should assure, not only in theory, but also in practice, the freedom to be religious. Therefore, it is imperative to consider this question from the standpoint of the religions. Professor Harold Berman even suggests "[i]t is a profound mistake . . . to consider the relation of law to religion solely from a legal point of view, that is, solely in terms of the *legal* foundations of *religious* freedom. It is also necessary to consider that relation in terms of the *religious* foundations of *legal* freedom."[14]

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13. D. DANELSKI & J. TULCHIN, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 143 (1973).

14. Berman, *The Interaction of Law and Religion*, 8 CAP. U.L. REV. 345 (1979) (emphasis in original).

Nor is it sufficient to accept the typical formulation used by the Court in pursuing and implementing definitions of such terms. The meaning of freedom and liberty has been a particular concern of political philosophers throughout the ages. The judicial approach to these definitions may be so narrow as to preclude the understanding of their full meaning. Thus, to the extent these concepts are political, and not merely legal, it is necessary that we draw upon the tools of political theory to aid in the quest for definitions.

Eugene Miller, a professor of political theory, argues that "political phenomena are not neutral with respect to the kinds of questions that are properly to be asked of them."[15] As an example, he uses Aristotle's *Rhetoric* to show how our political speech discloses those political questions of the greatest significance.[16] Miller suggests that we follow the Socratic tradition to structure our inquiry into political speech. Socrates made "what is" his primary question to enable philosophy to comprehend political and human things, and we will use the "what is" question to aid our search for definitions of freedom and liberty.[17]

Should we fail to follow this approach, we risk, in Miller's words, not being able "to reach clarity of understanding about a matter, especially something political like law, unless we can give an account of what it is. We must be able to define it in universal terms, to say what kind of thing it is, in order to reason about it."[18]

The Socratic method of inquiry is admittedly not without its detractors. In the view of some "modern philosophers," asking "what is" questions prejudges concepts in favor of the existence of an original or inherent cause, source, or essence.[19] Rather than begin an inquiry with such a bias, modern philosophers argue that theoretical questions should be concerned primarily with the "why" or the "how" of the existence of things. This focus enables the researcher to rank and classify these things by their kind or species,[20] not necessarily to reason about them, but rather to allow one

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The author's effort to present a religious perspective for some of the terms and concepts discussed in this article is not intended to be exhaustive, but rather suggestive of the wealth of insight into these issues from religious sources. Perhaps this work will encourage those from various persuasions to offer their contribution.

15. Miller, *The Primary Questions of Political Inquiry*, 39 REV. OF POL. 298, 301 (1977).

16. *Id.* at 309.

17. *Id.* at 317.

18. *Id.* at 328.

19. *Id.* at 318.

20. *Id.*

to predict, and in some instances, produce future events.[21]

In these methods, we see two vastly different approaches to theoretical inquiry. But in the face of this distinction, we must wonder if this concern with theory really makes any difference in understanding either the Court's interpretations of the religion provisions of the first amendment or the role of religion in society. We must conclude, given that what we do and how we act is only the manifestation of concepts (which are themselves formed by an epistemological framework), it is mandatory to consider these theoretical matters if we truly desire to pursue the meaning of liberty and freedom.

Let us now turn to the decisions of the Supreme Court to determine its methodology and examine its attempts to define these concepts. The Court has grounded its basis for freedom and its conception of liberty in the *Lochner* era decisions.[22] These decisions are well known for their use of the substantive due process doctrine to define and expand the concept of liberty. Under the common law, liberty "meant little more than the right not to be physically restrained except for good cause."[23] As early as 1819 there were indications that "liberty" was likely to be more expansively defined when, in dictum, Justice Johnson concluded that the Magna Charta was intended to "secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."[24]

A similar expansive view of liberty reappeared in the *Dred Scott* decision.[25] In that case, the Court invalidated Section 8 of the Missouri Compromise when it found the fifth amendment's due process clause protected the liberty to transport property, *i.e.* slaves. Once begun, the practice of defining liberty broadly continued unabated. In 1873 Judge Bradley, dissenting in the *Slaughter House Cases*,[26] articulated an argument supporting judicial protection of liberty interests through substantive review. He described lawful employment as a fundamental liberty: "This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's prop-

21. *Id.*

22. Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915).

23. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 387 (1978).

24. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819).

25. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

26. 83 U.S. (16 Wall.) 116 (1873).

erty and right. Liberty and property are not protected where these rights are arbitrarily assailed."[27]

The expansive definition of "liberty" reached its zenith in 1897 when, in *Allgeyer v. Louisiana*, the right to contract was recognized as a liberty interest protected by the fourteenth amendment.[28] Thus, in *Allgeyer*, the Court implemented Justice Chase's 1798 pronouncement that certain acts should be forbidden by "the *general principles of law and reason* . . . ."[29] To preserve the liberty to contract in 1905 the Court in *Lochner* voided a New York statute which regulated the working conditions and hours of bakers.[30] In a 1907 dissenting opinion, Justice Harlan stated that he could not conceive of liberties secured by the Constitution against hostile action by both the federal and state governments which do not "embrace the right to enjoy free speech and the right to have a free press."[31]

In 1920 Justice Brandeis articulated the next expansive phase when, in dissent, he said: "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."[32] Thus, in 1923, it was no surprise when Justice McReynolds, speaking for the Court in striking down a Nebraska statute forbidding German language instruction, stated that liberty, as protected by the fourteenth amendment, was intended to be broadly defined: "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[33]

Thus, the developing conception of broadly based individual liberties made inclusion of these new-found liberties under the protection of the fourteenth amendment inevitable. In 1925 the Court, in *Gitlow v. New York*, initiated the process for including freedom of speech and the press under the protection of the fourteenth

27. The Slaughter House Cases, 83 U.S. (16 Wall.) at 116.

28. Allgeyer v. Louisiana, 165 U.S. 578 (1897). Substantive due process made its debut in Wynehamer v. People, 13 N.Y. 378 (1856), when the Court of Appeals of New York invalidated a state prohibition law because, with respect to inventories obtained prior to the statute's passage, it constituted a deprivation of property.

29. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

30. Lochner v. New York, 198 U.S. 45 (1905).

31. Patterson v. Colorado, 205 U.S. 454, 465 (1907) (Harlan, J., dissenting).

32. Gilbert v. Minnesota, 254 U.S. 325, 343 (1920).

33. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citations omitted).

amendment.[34] Then, in 1940, the free exercise clause was held to be incorporated.[35] Finally, in 1947, the establishment clause also was held to be incorporated in the fourteenth amendment.[36] The incorporation process left as its legacy a new conception of "liberty." No longer was the citizen protected only from physical restraint, because "[t]his broad reading sought to establish ultimate independence for the individual by eliminating as many restraints on his or her freedom of choice imposed by government as possible."[37] These inclusions provided the means for implementing Justice McReynolds' objective to secure, as liberty, those privileges "essential to the orderly pursuit of happiness by free men."[38]

In contrast to the view of freedom as the liberty of the individual to maximize the spectrum of personal choice, we will now examine the views of those who address these questions from a religious perspective. For religious persons, political or physical liberty is inherently inadequate to address the totality of human respect and dignity. Freedom and liberty must encompass yet another dimension: spiritual liberty. Professor John Eidsmoe writes:

> If man is not a spiritual creature, no real liberty is possible. If man is purely physical, then he is entirely subject to the physical laws of cause and effect, his heredity, and his environment, and he is no more capable of freedom or meaningful choices than an ape or a computer.[39]

Religious writer Whittaker Chambers states:

> Freedom is a need of the soul, and nothing else. It is in striving toward God that the soul strives continually after a condition of freedom. God alone is the inciter and guarantor of freedom . . . . Religion and freedom are indivisible. Without freedom the soul dies. Without the soul there is no justification for freedom.[40]

From a more theoretical religious approach, the French theologian Jacques Ellul defines freedom as "the ethical aspect of hope."[41] He suggests that hope is:

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34. Gitlow v. New York, 268 U.S. 652 (1925).
35. Cantwell v. Connecticut, 310 U.S. 296 (1940).
36. Everson v. Board of Educ., 330 U.S. 1 (1947).
37. McGreevy, *Ellul and the Supreme Court on Freedom*, IV, Nos. 2 & 3 CHRISTIAN LEGAL SOC'Y Q. 27, 31 (1983); McGreevy ably links these decisions and Ellul's theology.
38. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
39. J. EIDSMOE, GOD & CAESAR, CHRISTIAN FAITH & POLITICAL ACTION 85 (1984).
40. W. CHAMBERS, WITNESS 16 (1952).
41. J. ELLUL, THE ETHICS OF FREEDOM 12 (1976).

> [A] response of man to God's work for him . . . .
> . . . [And] [i]f hope is the response of man to God's love and grace, freedom is the response of God to man's hope, giving man the possibility of living out hope concretely and effectively in daily life after a fashion which is not just hypothetical or sentimental.[42]

Freedom becomes then, for Ellul, not just a part of the expression of the Christian life; it is the essence of it, giving meaning to all events.[43] In an effort to demonstrate the uniquely transcendent quality that freedom holds for religious persons, Ellul states that freedom:

> [D]oes not have significative force. . . . It is like the light that has value only because it is reflected on objects. Even though the light gives these their form and solidity and color, the objects are the important things. We look at these, not at the light. The light is taken for granted. We fail to realize that the details which attract our attention would not exist without this light that we ignore. So it is with freedom.[44]

Freedom, in this view, is a quality apart from the objects on which it is brought to bear. It transcends the materiality of the objects.

These religious views of freedom contrast with the view which maintains that freedom consists of the individual having the maximum spectrum of choices available and the unfettered opportunity to choose among them. For Ellul, the maximum choice concept of freedom is superficial: "[O]ur choice is never free. We are conditioned by a number of factors . . . . [These factors demonstrate that] artificial choice is not freedom."[45] The frantic need for an ever expanding range of choice, which appears to be the logical consequence of this view, for Ellul is just the search for another god on whom it would be preferable to depend, since unfettered liberty separates us from God, resulting in a state of alienation similar to that which Marx described in secular terms.[46]

The freedom Ellul describes has its primary effects on the individual, resulting in meaningful liberty by altering views of self and others. It is "liberation from self-centeredness. This does not imply the end of self-awareness. Quite the contrary! It means that God

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42. *Id.* at 13.
43. *Id.* at 104.
44. *Id.* at 112.
45. *Id.* at 113.
46. *Id.* at 48.

grants us freedom by lifting the increasing burden of self-centeredness from us."[47]

Thus far, we have used the contribution of political theory to aid us in this search for definitions. We have asked "what is" questions of liberty and freedom, both from the perspective of religious persons and the Court. It appears that the approach of religious persons more closely approximates that of the Socratic tradition, asking "what is." Under this view, freedom exists as one learns to live in harmony with one's inherent limitations, and liberty is liberation from self-centeredness which enables one to overcome alienation and exercise meaningful choice.

The view of freedom espoused by the Court is one that encourages the individual to focus on self to enable the individual to better determine which of the myriad of choices available to select. Of course, the reverse consequence of this will be to accentuate any limitations of choices which may result from "accidents" of finances, environment, and other social circumstances or disabilities.

The Court's approach appears to approximate more closely the view of the modern philosophers. The Court typically asks the "why" and "how" questions, not only of political phenomena, but of social phenomena as well. This approach aligns the judiciary with the behavioral social sciences, which seek to "develop," rather than to "discover" the truth. In analyzing this view then, it is appropriate to question whether the Court now engages in jurisprudence or in the determination of social policy. Jurisprudence is traditionally known as: "The philosophy of law, or the science . . . of the principles of positive law and legal relations. . . . Jurisprudence is more a formal than a material science."[48] The methodology followed by the Court and the resulting definitions hardly seem consistent with traditional jurisprudence.

C. What is Religion?

We have Thomas Jefferson to thank for an insightful distinction which places in perspective the sphere of individual thoughts and beliefs and the proper limitations of government intrusion into them. Jefferson eliminates one entire subject from any public scrutiny, namely, " 'the operations of the mind . . . .' "[49] No one should

47. *Id.* at 137.

48. BLACK'S LAW DICTIONARY 767 (5th ed. 1979).

49. W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 36 (1976).

suggest that the government has any right to regulate the purely mental processes of its citizens. Of course, a different approach is appropriate when conduct is involved. Jefferson spoke directly to this point in his bill which established religious freedom in Virginia: "[I]t is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order . . . ."[50] Included in these acts which are subject to civil authority are those that are based on religious opinion.

Just as we undertook to define freedom and liberty so that we could "reason" about them, so we must now undertake to explore the definition of "religion." As Jefferson observed, even religious conduct must be regulated to preserve "peace and good order."[51] Yet, the extent of any regulation must be circumscribed because religious belief receives special treatment under the first amendment, both to protect its free exercise and to prevent the government from favoring certain religions. A tension has traditionally existed between the exercise of this right and the duty of the government to intervene on behalf of the "peace and good order" of society. Thus, the question of what qualifies as a "religion" must be resolved in order to respond to this conflict. The conflict is further confused when conduct based on "sincere beliefs" is asserted as being equal to religion, thus obscuring the definition of religion and possibly making the concern for a definition obsolete. Thomas Emerson articulates the basis for this confusion:

> In earlier times religious belief was the most precious form of belief, and the one most in need of protection. Today other forms of belief have assumed equal or greater importance in the lives of many people. Thus freedom of political belief has come to have larger significance as citizen participation in community affairs has expanded. The question is posed whether secular beliefs should not be entitled to the same degree of protection as religious beliefs.[52]

An examination of Supreme Court decisions will enable us to know whether Emerson's question is prophetic or speculative. In one of the earliest religion cases, *Davis v. Beason*,[53] the Court dealt with the issue of Mormon polygamy and formulated a clearly theis-

50. DOCUMENTS OF AMERICAN HISTORY 125, 126 (H. Commager 7th ed. 1963) (quoting the Virginia Statute of Religious Liberty).

51. *Id.*

52. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 26 (1970).

53. 133 U.S. 333 (1890).

tic definition of religion:

> The term "religion" has reference to one's views of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confused with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter.[54]

For current issues, however, the Court has not formulated a specific definition of religion. In fact, the Court has asserted that the government should avoid attempts to define religion. Justice Douglas stated: "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[55] Despite this injunction, we will see that the Court has continued to rule on disputes involving the definition of religion, resolving the issue through analogies and negatives, rather than firmly and positively. To see how the Court has handled the definition of religion, we will examine two problem areas: first, the oath of office and military objector cases; and second, the distinction between political and religious expression.

1. The Oath of Office and Military Objector Cases

The first significant departure from the *Davis* formulation came in 1961 in Maryland when Roy Torcaso refused to take an oath of office which required him to swear to belief in God. Speaking for the Court, Justice Black said that governments, state and federal, were prohibited from enactments which "aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[56] Justice Black listed Buddhism, Taoism, Ethical Culture, and Secular Humanism as religions not based on belief in the existence of God.[57]

Not only did this opinion expand the scope of the definition of religion to include nontheistic beliefs, but it also hinted at the future expansion of the definition by indicating possible inclusions in

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54. Davis v. Beason, 133 U.S. 333, 342 (1890). This definition reflects the view of religion which existed during the Revolution and at the time the Constitution was written. The Virginia Declaration of Rights, dated June 12, 1776, provides another definition of religion which reflects the views of Virginians at that time. It states that religion is "the duty which we owe to our Creator, and the manner of discharging it . . . ." *See* 2 B. SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 236 (1980).

55. United States v. Ballard, 322 U.S. 78, 86 (1944).

56. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

57. *Id.* at 495 n.11.

the penumbra of "religious liberty." The Court said the Maryland oath requirement violated Torcaso's "freedom of belief and religion and therefore cannot be enforced against him."[58] One commentator, a constitutional law specialist known for his work in the field of personal liberty, has noted the tremendous gap, both in logic and practice, that this statement leaves open:

> The opinion, however, did not disclose that Torcaso had any beliefs or any religion. Thus it would seem that non-belief and non-religion may conceivably come under the protection of the Free Exercise Clause. By this decision the Court has left a large comma in an unfinished sentence respecting the question of What Is Religion?[59]

The definitional problem has been addressed most specifically in cases concerned with military service exemptions. Since the Continental Congress in 1775, and in the United States Congress from the Civil War until 1967, our government, through legislative enactment, has made "religion" a basis for exemption from combat military service.[60] The cases addressing this issue demonstrate the Court did not leave the "comma" dangling for long.

Soon after *Torcaso*, the Court expanded the scope of the exemption from military service beyond expected limits. In *United States v. Seeger*,[61] the Court drew four major conclusions: (1) Religion was to be defined by the individual, not by draft boards and courts. "Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious."[62] (2) Belief was to be equated with religion. "We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers."[63] (Seeger was not a Quaker, but did volunteer work with them.) (3) The belief must be truly held. "But we hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of

58. *Id.* at 496.

59. Ball, *What is Religion?*, VIII CHRISTIAN LAW. 7, 8 (1979).

60. W. BERNS, *supra* note 49, at 45-47; L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 151-52 (1975).

61. 380 U.S. 163 (1965).

62. *Seeger*, 380 U.S. at 185.

63. *Id.* at 187.

course, a question of fact . . . ."[64] (4) A draft board or court could implement these standards without knowing the substance of the individual's beliefs. "It may be that Seeger did not clearly demonstrate what his beliefs were with regard to the usual understanding of the term 'Supreme Being.' But as we have said Congress did not intend that to be the test."[65]

The *Seeger* decision resolved some of the definition and application problems of the exemption statute. In Pfeffer's words, the Court "met them by first taking God out of religion and then taking religion out of religion."[66] The Court's analytical method was employed to determine how one thing is similar or different from another. This method again evidenced the "modern" philosophical approach of the Court, in contrast to the classical approach which asks "what is" questions. A "what is" analysis would result, theoretically, in a working definition of religion and then conclude with an application of this standard. The Court, however, came to an analogous conclusion which bore no resemblance to the original. The starting point, exemption based on religious belief, was redefined so that any belief qualified for the exemption. However, it is simply not true that religious belief and beliefs generally are the same. The Court promulgated self-contradictory observations and claimed to have addressed the issues presented.[67]

The next major military service case was *Welsh v. United States*,[68] decided in 1970. Whereas Mr. Seeger put quotation marks around the word "religious" in his conscientious objector application, Mr. Welsh struck it out in his application[69] "and later characterized his beliefs as having been formed 'by reading the fields of history and sociology.' "[70] The Supreme Court said the lower court had been wrong to use these differences as a basis for distinguishing the cases because: "[I]t places undue emphasis on the registrant's interpretation of his own beliefs . . . . But very few registrants are fully aware of the broad scope of the word 'religious' as used in section 6(j) [of the Universal Military Training and Service Act], and accordingly a registrant's statement that his

64. *Id.* at 185.
65. *Id.* at 187.
66. PFEFFER, *supra* note 60, at 153.
67. *See Seeger*, 380 U.S. at 184-87.
68. 398 U.S. 333 (1970).
69. *Welsh*, 398 U.S. at 341.
70. *Id.*

beliefs are nonreligious is a highly unreliable guide . . . ."[71] The judicially articulated broad scope of the word "religious," however, is not contained in section 6(j). It is little wonder that the Court has to put itself inside a person's mind in order to determine if he qualifies under the definition. The broad scope of the statute is solely the result of "[t]he Court's creative manipulation of words . . . . To avoid invalidating 6(j) [Justice] Black made it [the statute] say precisely what 6(j)'s words take pains to avoid."[72] Justice Harlan, in concurrence, was unequivocal in his agreement with this criticism:

> In my opinion, the liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them. There are limits to the permissible application of that doctrine, and . . . those limits were crossed in *Seeger*, and even more apparently have been exceeded in the present case.[73]

Trying to clarify which persons qualified for the exemption, the Court summarized the application of its ruling:

> The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.[74]

In his concurring opinion, Justice Harlan also argued for an equal protection application which would invalidate the "religious" class created by the Congress and singled out for favorable treatment. He stated that to deny the exemption to a sincere, yet nonreligious person was the establishment of public policy in favor of the religious, and was therefore unconstitutional.[75]

If in *Seeger* the Court took God out of religion, and then proceeded to take religion out of religion, the Court in *Welsh* took religion out of society. It is incredulous to think that a majority of the United States Supreme Court would say that an applicant's "statement that his beliefs are nonreligious is a highly unreliable

71. *Id.*
72. L. CARTER, REASON IN LAW 179-80 n.6 (1979).
73. *Welsh*, 398 U.S. at 345 (Harlan, J., concurring).
74. *Id.* at 342-43.
75. *Id.* at 356-57 (Harlan, J., concurring).

guide, . . . [and] undue emphasis [should not be placed] on the registrant's interpretation of his own beliefs."[76] Apparently, it is far superior for the Court itself to enter into the mind of each objector applicant and tell him what he believes. Yet, did we not begin this effort to define religion by excluding from the province of the government "the operations of the mind"? How truly modern the Court has made the Constitution!

The Court has placed the law in a posture similar to other modern disciplines. For example, consider the field of literature in which modern fiction is now known as "superfiction." Superfiction did to the artistic field of writing exactly what the Court did to the law of religion in its religious liberty cases. Discussing superfiction, one commentator, who is an author and professor of literature, writes:

> In the world of the contemporary superfictionist, we are most frequently inside a character (or characters) looking *in — or* these inner phantasms are projected outward, and in a sometimes frightening, sometimes comical reversal, the outside 'reality' begins to look more and more like a mirror of the inner landscape — there is so little difference between the two.[77]

The Court's view of religion has left us with an "outside reality" which is indistinguishable from the inner landscape of the mind. It even appears that the inner phantasms of belief have in fact become "religion." The Court has simply failed to provide a definition of religion, and its pronouncements on the issue only add confusion to the subject.

2. *The Distinction Between Political and Religious Expression*

Arguably, the modern Court's view of religious liberties was not intended by the framers of the Constitution. A review of contemporary sources indicates that the framers intended to protect the freedom to practice religion without unwarranted state intrusion. The framers did not intend the provisions to protect nonreligious activities. In the debates on the religion clauses of the first amendment, Madison stated that the purpose of these provisions was to assure that the national government could not "compel men to worship God in any manner contrary to their conscience."[78] Con-

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76. *Id.* at 341.

77. Bellamy, *Fiction in the Age of Excess*, SAT. REV., Aug. 23, 1975, at 41.

78. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 730 (debate of Aug. 15, 1789) (J. Gales ed. 1834) [hereinafter ANNALS OF CONGRESS].

gressman Huntington suggested that the amendment be worded "in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[79]

Many state charters and constitutions also made this distinction. For example, the Georgia Colonial Charter provided that "there shall be liberty of conscience allowed in the worship of God,"[80] and the Georgia Constitution of 1798 guaranteed the "privilege of worshipping God in a manner agreeable to his own conscience."[81] We might say the difference is that of "conscience" on the one hand, and "conscience plus God" on the other. The framers intended the religion clauses to protect "conscience plus God." The protection of pure conscience and other sincere beliefs would be left to other adequate constitutional protection, such as the freedoms of speech, press, assembly, and petition.

Three significant problems are created for American society by the modern Supreme Court's approach in the conscientious objector cases. The first is that religion has been debased. One commentator cogently argues that today we "fail to appreciate the distinction the Founders drew between religious and political speech, a distinction that required them to accord absolute freedom to the one and to impose limits on the other."[82] Obviously, this distinction cannot be appreciated if the Court cannot define religion.

This commentator further asserts that, although the framers believed in the importance of religion for the development of the character traits essential to citizens of a free republic, they also acknowledged that the government could not know or determine religious truth, nor should it attempt to do so.[83] Such an undertaking would be inappropriate for government because its purpose is to secure life, liberty, and the pursuit of happiness, and not to secure eternal bliss for its citizens.[84] Therefore, the truth or falsity of religious claims are irrelevant to the ends of government and to political discourse. However, since religious truth is not politically knowable, and religion has to be preserved for the sake of self-government, the pursuit of religious truth must be protected abso-

79. *Id.* at 730-31.

80. Charter of the Province of Georgia, *reprinted in* W. McELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA 223 (1912).

81. GA. CONST. of 1798, art. IV, § 10.

82. W. BERNS, *supra* note 49, at 146.

83. *Id.* at 80-83.

84. *Id.* at 82.

lutely. This conclusion not only gives full recognition to a fundamental right of the citizen, it is also politically expedient. Why else would the religious submit politically to the government if they had no guarantees of freedom in their religion?[85]

With regard to political expression, or expression based on conscience or sincere belief, the framers were convinced of the political truth that the Constitution should be "derived from a 'self-evident' precept respecting man's nature and the government appropriate to it."[86] The form of government was structured and implemented on the "assumption" of this "self-evident" precept; namely, that a republican democracy is the best guarantor of individual liberties. This assumption constituted a political "bottom line," something that was known, something that was more than opinion. Berns quotes Professor Mansfield's observation that: "[I]f this 'truth were but an opinion, it could not protect free inquiry into other opinions.' "[87] Religion was one of those "other opinions" into which free inquiry would be protected under the form of democracy that the framers established.

Berns concludes his argument with an observation which is supported by examining the conscientious objector cases. He states:

> The idea that religious and political opinions are to be treated alike, as if entitled to equal protection, derives from the gradual acceptance of the view, first expressed on the Court by Holmes in his *Gitlow* dissent in 1925, that the Constitution rests on nothing at all — or rather, on no principle immune from the whims of transient majorities.[88]

The failure of the Court to distinguish between religious and political expression reduces religion to the level of a nonpreferred opinion, even though the first amendment grants religious opinion preferred treatment.[89] The Court's failure to make this distinction has a negative impact on religious expression because it makes the free exercise of religion less well secured.

However, the reverse also can be argued. When no distinction is made between religious and political expression, it is difficult to know what type of expression will be protected under the first amendment. This difficulty is the second problem the objector

85. *Id.* at 146.
86. *Id.*
87. *Id.*
88. *Id.*
89. *See infra* note 135 and accompanying text.

cases create for our society. The Court has given to the irreligious[90] objector a status for his opinions equal to that granted religious opinions. Thus, the first amendment free exercise clause must now be held to protect not only the free exercise of religion, but also the free exercise of belief. Rather than preferred religious rights being reduced to a nonpreferred level, under this interpretation mere opinion is elevated to the preferred status of religious belief. In Berns' discussion of the distinction between religious and political speech, he concludes that the framers intended to "accord absolute freedom to the one [religious speech] and to impose limits on the other [political speech]."[91] Thus, by elevating the beliefs of the irreligious objector (which is essentially political opinion) to the same level as that granted religious beliefs, the Court has broadened the reach of the free exercise clause far beyond that intended by the framers.

The third critical problem for society resulting from these conscientious objector decisions is the potential for an intolerant majority on the Court to perpetuate the misapplication of the religion provisions in yet another way. Justice Rutledge, in his dissent in *Everson v. Board of Education*,[92] reasoned that the same definition of religion must apply in both establishment and free exercise applications.[93] If any belief can qualify as a religion under the free exercise clause, the Court theoretically could prohibit the expression of any challenged belief attacked in an establishment clause context. The Court has done this with religious expression in public schools and, under this precedent, anyone could challenge any controversial subject as a religion and have it banned from public consideration. Perhaps the religion provisions of the Constitution, as interpreted to give "religious" status to all thought, will come to protect us from all thought!

The review of these three problems demonstrates the significance of the potential for disruption in both religious and political areas resulting from the failure of the Court to maintain a traditional theistic definition of religion. By asking "why" and "how"

90. William B. Ball attributes to C. S. Lewis an insight into the definition of religion. The common misconception of the antithesis of religious conduct is usually described as an example of *nonreligious* activities. However, Lewis is credited with remarking that "there are no *nonreligious* activities, only *religious* and *irreligious*." Ball, *supra* note 59, at 11.

91. W. BERNS, *supra* note 49, at 146.

92. 320 U.S. 1 (1947).

93. Everson v. Board of Educ., 320 U.S. at 32 (Rutledge, J., dissenting).

questions about political and social issues, the Court again has evidenced a tendency to establish national social policy, rather than to engage in jurisprudence.

D. Religion and Education

Next, we will consider how the Court has applied the religion provisions in the context of education. Public education provides the best example of a locus for conflict between the free exercise clause and the "wall of separation" theory of the establishment clause. For example, in *Wilkerson v. City of Rome*,[94] the free exercise right was interpreted by the Georgia Supreme Court to permit school principals to conduct daily worship services in the public schools, including prayer and readings from the King James version of the Bible. Students could exempt attendance only by written request.[95] Forty years later, in landmark decisions, the United States Supreme Court asserted its jurisdiction over the enforcement of the Bill of Rights, holding that religious exercises, similar to those at issue in *Wilkerson*, were an unconstitutional establishment of religion.[96]

1. Wallace v. Jaffree: *An Introduction*

A recent decision addressing the issue of school prayer, *Wallace v. Jaffree*,[97] is a good example of the Court's application of the establishment clause to state statutes that permit prayer in schools. This case also provides an excellent review of the conflict between the free exercise and establishment clauses and of the purpose of the establishment clause. The facts in *Jaffree* are uncomplicated. An Alabama statute provided:

> "At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."[98]

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94. 152 Ga. 762, 110 S.E. 895 (1922).

95. Wilkerson v. City of Rome, 152 Ga. at 781, 110 S.E. at 904.

96. Engel v. Vitale, 370 U.S. 421 (1962). *See also* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (holding that state law may not require Bible passage readings or prayer in schools, even when the law permits children to be excused from the exercises upon written request from parents).

97. 472 U.S. 38 (1985).

98. *Jaffree*, 472 U.S. at 40 n.2 (quoting ALA. CODE § 16-1-2.1 (Supp. 1984)).

A parent, challenging the statute on behalf of his children, sued school and state officials. The district court held that the statute was constitutional, but the court of appeals reversed, holding that even though the statute was "permissive in form, it is nevertheless state involvement respecting an establishment of religion."[99] In affirming the court of appeals, the Supreme Court observed: "At one time it was thought that this right merely proscribed the preference of one Christian sect over another . . . ."[100] The Court's comment suggests that some event occurred altering this view. Without discussing "this event," the Court then concluded that because "the underlying principle has been examined in the crucible of litigation,"[101] the establishment clause has created a wall separating church and state. That is, neither the federal nor any state government "can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "[102]

This expansive reading of the establishment clause, in addition to forestalling intolerance among Christians, now also recognizes and encompasses an interest in forestalling "intolerance of the disbeliever and the uncertain."[103] Justice O'Connor's concurrence was even more emphatic, expressing concern against infringing upon "the religious liberty of the nonadherent . . . ."[104] With this case, the Court inserted into the general body of religious liberty law the principle that nonbelievers and the irreligious have "religious liberty" protection for their irreligious beliefs. Thus, the groundwork laid in the military exemption cases paved the way for the potential undermining of meaningful religious liberty rights.

For example, the Court suggested that a pure "moment of silence" statute might be acceptable,[105] although Justice O'Connor admitted: "This line may be a fine one . . . ."[106] In its decision to void the Alabama statute, the Court said that by indicating voluntary prayer was appropriate during the silence, the statute "char-

99. Jaffree v. Wallace, 705 F.2d 1526, 1535 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).
100. *Jaffree*, 472 U.S. at 52.
101. *Id.*
102. Everson v. Board of Educ., 330 U.S. at 15-16.
103. *Jaffree*, 472 U.S. at 54.
104. *Id.* at 70 (O'Connor, J., concurring).
105. *Id.* at 66.
106. *Id.* at 84 (O'Connor, J., concurring).

acterized prayer as a favored practice. Such endorsement is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion."[107] Justice O'Connor emphasized that the problem with the statute is that it places the "power, prestige, and financial support of government . . . behind a *particular religious belief* . . . ."[108] Thus, in addition to granting religious liberty to the irreligious, the Court has concluded that voluntary prayer supports a particular religious belief. In reality, the prayer issue before the Court was not just that of a voluntary prayer, it was the discretionary aspect of the voluntary prayer that apparently caused concern. According to the statute, the teacher decided whether to allow time for the moment of silence, and thus, the teacher determined whether an opportunity for prayer would be created. Only then could the student have the moment of silence during which prayer was at the option of the student.

Thus, the Court has defined religion to include its antithesis, with particular beliefs deemed to encompass the nonparticular. As a result, it is not surprising that registrants requesting exemption from military service are not held to know what they believe or that anyone other than the Supreme Court knows what the Constitution says. This result confirms the observation of Justice Hughes that the Constitution means what the judges say it does.[109]

In dissent, Chief Justice Burger accused the majority of creating not "neutrality but hostility toward religion," and called the majority's conclusion that this statute established religion "ridiculous."[110] Justice White, also dissenting, observed that by expressly allowing for voluntary prayer in the statute, the state had only provided a legislative answer to the likely question of a student, " 'May I pray [during the period of silence]?' "[111]

Justice Rehnquist's dissent expanded into a historical examination of the establishment clause, the intent of the framers, and the purpose behind adoption of the clause. He asserted that the establishment clause could be applied correctly only after developing a thorough understanding of this history.[112] A study of Rehnquist's

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107. *Id.* at 60.

108. *Id.* at 70 (O'Connor, J., concurring) (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)) (emphasis added).

109. *See supra* text accompanying note 13.

110. *Jaffree*, 472 U.S. at 89 (Burger, C.J., dissenting).

111. *Id.* at 91 (White, J., dissenting).

112. *Id.* at 92 (Rehnquist, J., dissenting).

dissent and the historical sources upon which it relied reveals he is correct, both in his approach to the problem and in his conclusions. It is appropriate to review this history to determine whether the *Jaffree* decision rests on a foundation that will provide a workable framework for the future or whether, in contrast, Rehnquist's sources provide a more reliable view.

First, we will examine the theoretical arguments surrounding the issue whether the intent of the framers is important to understand and interpret the Constitution today. Next, in an effort to determine the framers' intent in adopting the religious liberty provisions, we will examine what the framers said and did.

2. *Is the Framers' Intent Important?*

We have arrived at this question in the midst of examining the *Jaffree* decision. In that case, the majority apparently was content with the historical understanding developed in earlier decisions. Justice Rehnquist insists that the opinion is based upon a metaphor which is not only inaccurate historically, but also causes the greater harm of diverting judges from the original intent of the framers.[113] His concern for the original intent is not universally shared. Opponents of Rehnquist's approach say our new Chief Justice writes opinions which "are scornfully charged with 'filio-pietism,' 'verbal archeology,' [and] 'antiquarian historicism that would freeze [the] original meaning' of the Constitution."[114] A puzzling twist to this argument is suggested by a well known and respected authority, E.S. Corwin: "As helpful as it is to separate out the two religion clauses of the First Amendment for analysis and explication, it may inhibit understanding to do so."[115]

On the other hand, significant authority supports the critical role of original intent in constitutional analysis. In Madison's words: "[I]f 'the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers.' "[116] The validity of Madison's statement was expanded in a recent observation that ignoring the meaning of the words used by the framers "reduces the Constitution to an empty shell into which each shifting judicial

113. *See id.* at 99.
114. R. BERGER, GOVERNMENT BY JUDICIARY 363 (1977) (footnotes omitted).
115. E. CORWIN, *supra* note 23, at 295.
116. R. BERGER, *supra* note 114, at 364 (footnote omitted).

majority pours its own preferences."[117] A helpful analogy demonstrating one way to understand our republican institutions comes from one respected in the field of American history: "[I]f we wish to understand those institutions, then we too must return to the thoughts of the Founding Fathers. We too must look to the architects for the plan of the house in which we still reside."[118]

If we decide that the intent behind the words in the Constitution should be considered in constitutional analysis, the next question is how much weight should intent be given? An enlightening contrast exists between the views of Chief Justice Hughes and Justice Sutherland. Chief Justice Hughes asserted a view that the Constitution means today what the framers would say they meant if faced with the particular issue currently being addressed by the Court.[119] Justice Sutherland, on the other hand, suggested in a dissent that the words mean today what they meant when adopted.[120]

Justice Brennan might agree with Chief Justice Hughes. As previously quoted, in *School District of Abington Township v. Schempp*, Brennan warned of a "too literal quest for the advice" of the framers.[121] Rather, according to him, we should determine "whether the practices here challenged threaten those consequences which the Framers deeply feared . . . ."[122] Thus, he suggests that we need to know only enough of the framers' original intent concerning a particular result to decide whether the "practices . . . challenged threaten those consequences which the Framers deeply feared," and need not be concerned with the framers' original intent as to the issues underlying a particular result in an individual case.[123] Brennan's view is contradictory and leads to confusion about the value and relevance of original intent.

The traditional view of the role of intent in constitutional interpretation, as recognized by Justice Brewer, follows Justice Sutherland's approach:

> The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. . . .

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117. *Id.* at 315.

118. Diamond, *The Revolution of Sober Expectations*, in READINGS IN AMERICAN DEMOCRACY 66 (1979).

119. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934).

120. *Id.* at 448-49 (Sutherland, J., dissenting).

121. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring). *See also supra* text accompanying note 10.

122. *Schempp*, 374 at 236 (1963) (Brennan, J., concurring).

123. *Id.*

> . . . .
> . . ."[Any] other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."[124]

From this review, it is apparent that most serious approaches to constitutional analysis give some weight to the framers' original intent. How much weight is given depends on one's philosophy of history and is influenced by whether the historical record permits determination of the original intent. Given this broad consensus, it is now necessary to see if the intent behind the religion provisions can be determined.

3. What Was the Intent of the Free Exercise and Establishment Clauses?

In order to determine the intent of a document written two hundred years ago, it is necessary to evaluate both the direct and the indirect evidence surrounding the writing. The direct evidence consists of what the framers said and did, while the indirect evidence consists of possible indications of their motivations, as well as related events, historical interpretations, and commentary.

The principal debate about the religion provisions in the first amendment occurred on the floor of the House of Representatives on Saturday, August 15, 1789.[125] The record of the debate provides a concise look at the major concerns expressed regarding state and federal jurisdiction, the scope of the provisions, their impact and purpose. The following excerpts are from the record of the debate about the version of the first amendment which eventually was adopted:

> Mr. Sylvester . . . feared it might be thought to have a tendency to abolish religion altogether.
>
> . . . .
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> Mr. Gerry said it would read better if it was that no religious doctrine shall be established by law.
>
> . . . .
>
> Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. . . .

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124. South Carolina v. United States, 199 U.S. 437, 448-49 (1905) (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1856)).

125. ANNALS OF CONGRESS, *supra* note 78, at 729-31.

> Mr. Huntington . . . hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.
> Mr. Madison . . . believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion in which they would compel others to conform.[126]

Each of these participants in the debate agreed on the central objectives of the provisions because the participants shared similar fears. Their conclusion: there should be no national religion. The federal government would have no authority to favor one religion over another. There was nothing to prevent nondiscriminatory federal assistance to religion, however. Even Madison, who may have had private concern about assistance to religion, acquiesced in the view of these others.[127] And finally, all participants agreed that each person should be free to worship God according to the dictates of his own conscience.

Much of what the framers did at or near the time of the adoption of the first amendment supports the basic principles which were agreed upon in the debates. None of the events contradict the framers' apparent agreement. For example, on May 1, 1789, the House of Representatives appointed a chaplain,[128] a position which still exists in both Houses of Congress today. On September 25, 1789, the House approved the final wording of the first amendment and sent it to the states for ratification.[129] The next day a resolution for a Thanksgiving Day proclamation was proposed.[130] Even President Madison issued at least four Thanksgiving Day proclamations.[131] The Northwest Ordinance of 1787, passed again in 1789, specifically provided for the protection of religion in that territory: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[132]

Why would the framers say and do things that are clearly religious? Washington summed it up well in his Farewell Address on

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126. *Id.*
127. M. MALBIN, RELIGION AND POLITICS 9 (1978).
128. ANNALS OF CONGRESS, *supra* note 78, at 242.
129. *Id.*
130. *Id.* at 947-48.
131. R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 31 (1982).
132. *See* DOCUMENTS OF AMERICAN HISTORY, *supra* note 50, at 131.

September 17, 1796: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion."[133]

Jefferson observed: " '[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?' "[134] Madison expressed a concern that both political and religious rights need to be protected and preserved: "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."[135]

Thus, in reviewing the historical perspective surrounding the implementation of the religious liberty provisions, it appears that the framers adopted these provisions to implement their belief that religion was necessary to the maintenance of the republican form of government that they were founding. Religion was not to be the direct business of the government, but it was to be encouraged to assure that the competition naturally resulting from diversity would prevent the evils mentioned in the debates.

The conclusion that the original intent of the framers was to permit government encouragement of religious activities is also supported by the contemporary actions taken by state governments to advance religion. For example, the New Jersey Constitution of 1776, which predates the debates on the first amendment by thirteen years, contained the first expression of protection of religious liberty that separately recognized the exercise and establishment dimensions.[136] The New Jersey provisions were typical of the other state constitutions during that time. Regarding free exercise, New Jersey provided for freedom of conscience for the purpose of worshiping God. Its establishment provision clearly expressed an intent to prohibit preference and discrimination among religions, but did not show an intent to erect a "wall of separation" between church and state.[137]

These objectives of the religious liberty provisions were so widely accepted that, over a century later, in 1898, thirty-six states had free exercise clauses protecting freedom of conscience in the

133. *Id.* at 173.
134. W. BERNS, *supra* note 49, at 13-14.
135. THE FEDERALIST No. 51, at 324 (J. Madison) (C. Rossiter ed. 1961).
136. 2 B. SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 267 (1980).
137. *Id.*

worship of God, and twenty-five states had establishment clauses that were based on the objective of preventing preference or discrimination among religions.[138] Certainly the clear intent of legislatures throughout the country was the same as that voiced by the framers.

Two principal commentators in the mid-1800's, Justice Story and Thomas M. Cooley, gave scholarly affirmation to the intent of the framers. Both of these writers confirmed that the religion provisions in the first amendment set out to accomplish just what the framers said in the debates: there would be no national church or religion; freedom of conscience to worship God would be secured against the national government; and the states would be free to deal with religious matters as they desired. Thus, according to these commentators, states would be free to aid religion or establish a religion.[139]

4. How Did the "Wall" Theory Come to Overshadow the "Preference" Theory?

Justice Story's interpretation of the framers' intent regarding establishment clause questions has been described as the "preference" theory.[140] It seems odd to reduce a description of historical fact to a "theory," but that is often what happens as a prelude to discarding an accepted view in order to replace it with something else. In contrast to the preference theory, which maintains that the government could aid religion generally, but could not prefer or discriminate among the religions, the "wall of separation" theory maintains that a strict wall of separation should be erected between church and state, with this result best accomplished by the government taking a position of strict neutrality toward religion and offering no aid whatsoever.[141] The "wall" theory quickly ascended to dominance.

The first use of the wall theory as a guide to interpreting the Constitution is found in *Reynolds v. United States*.[142] The Court upheld prohibitions against polygamy, notwithstanding arguments that polygamy was merely a religious practice of Mormons and

138. H. DESMOND, THE CHURCH AND THE LAW 107-20 (1898).

139. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (2d ed. 1851) and T. COOLEY, CONSTITUTIONAL LIMITATIONS (1868).

140. *See* J. STORY, *supra* note 139, at 628-32.

141. Reynolds v. United States, 98 U.S. 145, 164 (1878); *cf.* Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

142. 98 U.S. 145 (1878).

therefore protected under the free exercise clause.[143] In Jefferson's letter to the Danbury Baptists, the Court found its answer to the question "What is the religious freedom which has been guaranteed?" In his letter, Jefferson said the establishment clause had the effect of "building a wall of separation between Church and State."[144] The Court accepted this "almost as an authoritative declaration of the scope and effect of the amendment" and took it to mean that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[145]

In applying the Jeffersonian view in *Reynolds*, the Court outlined a brief history of the legal and social objections to polygamy and concluded that "[i]n the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."[146] Thus, the Court found that the wall of separation was not a barrier to legislative action prohibiting polygamy. In this instance, no barrier existed because of the overriding moral and social concerns at issue, even if this result restricted the free exercise of religion. The Court correctly used the metaphor to separate the nonexistent congressional power to regulate belief from its existing power to regulate conduct. This point was made by Jefferson when he contrasted the nonregulable "operations of the mind,"[147] with the regulable "overt acts against peace and good order . . . ."[148] The Court did not apply the wall analogy for the purpose of erecting a general and imposing barrier setting religion apart from and at odds with the state. Unfortunately, this is precisely what the wall metaphor has come to mean.

The wall metaphor lay dormant until 1947, when it was revived by the Court in *Everson v. Board of Education*[149] to uphold a state statute which reimbursed parents for the cost of bus transportation to parochial schools. In that case, the Court incorporated the establishment clause as a burden upon the states through the fourteenth amendment. In so doing, the Court laid the foundation to apply the wall theory broadly as a measure to determine the con-

143. *Id.*
144. THE WRITINGS OF THOMAS JEFFERSON 281-82 (A. Lipscomb ed. 1904).
145. *Reynolds*, 98 U.S. at 164.
146. *Id.* at 165.
147. W. BERNS, *supra* note 49, at 36.
148. DOCUMENTS OF AMERICAN HISTORY, *supra* note 50, at 126.
149. 330 U.S. 1 (1947).

stitutionality of state involvement with religious matters.

The *Everson* Court cited *Reynolds* as authority for the Jefferson wall analogy, but applied it to a totally inapposite set of facts. In *Reynolds*, the problem was free exercise, not establishment, and the *Reynolds* Court, in fact, accurately applied Jefferson's idea. In *Everson*, the Court took free exercise authority and created the framework for establishment clause analysis. Additionally, the Court in *Everson* did not accurately apply Jefferson's idea. The *Everson* Court ignored Jefferson's observations on religion in his second Inaugural Address in 1805,[150] which were made three years after his "wall" remarks, as well as his more complete remarks in a letter to a presbyterian clergyman in 1808, explaining why he did not issue religious proclamations when he was president.[151] This letter merits close scrutiny as an indicator of Jefferson's views on religious liberty.

> "I consider the government of the United States as interdicted by the Constitution from intermeddling *with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the [sic] establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States.* Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. *It must then rest with the States, as far as it can be in any human authority.* . . . I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines . . . . Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it."[152]

Jefferson's letter makes the same point that was made in the House debates, namely, fear of granting the federal government power over religion and agreement to leave the issue to the judgment of the states. Jefferson's 1808 letter should be given greater weight because it was written after his presidency and is appar-

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150. INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 18 (U.S. Gov't Printing Office 1969).

151. R. CORD, *supra* note 131, at 40.

152. *Id.* (quoting reprint of Jefferson's letter) (footnote omitted) (brackets in original).

ently a more considered opinion. In contrast, the Danbury Baptist letter of 1802 was written during his presidential tenure and was in response to attacks accusing him of being an infidel and an atheist.

With this background in mind, the Rehnquist dissent in *Jaffree* becomes even more persuasive. The metaphor of a wall separating church and state is found only in a letter. The metaphor initially was applied correctly in the free exercise context, yet developed into an absolute analytical standard. This suggests that the time has come for establishment issues to be evaluated according to guides which are more correct historically. The allegiance paid to Jefferson's observations on the meaning of the first amendment, in support of any theory, is also suspect, given the wealth of other material on the subject and his absence from the country during the House debates and ratification.

5. Jaffree: *From Bad Metaphors to Bad Analogies*

In addition to the blind adherence to historically incorrect legal theories, the *Jaffree* Court also relied heavily on a line of authority it incorrectly claimed to be analogous. The Court's analogy stated that:

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.[153]

The inapposite theory behind the right to refrain from speaking comes from *Board of Education v. Barnette*, in which the Court recognized, on free speech grounds, the right not to say the Pledge of Allegiance.[154] Thus, the state cannot force a citizen to articulate verbally and audibly any words which reflect on opinion and belief. *Barnette*, however, does not take the further and unjustified step of prohibiting all who desire to make a public and oral statement of belief from doing so. To take that step would be absurd because it would permit a minority who desires not to make an expression to frustrate the great majority who wish to make an expression.

What if this approach were applied to the typical free speech case? Any picket, any demonstration, any expression which was

153. Wallace v. Jaffree, 472 U.S. 38, 52 (1985).
154. 319 U.S. 624 (1943).

found unacceptable to another, arguably, would have to be terminated, if a person claimed that the conduct would infringe this potential right not to be exposed to disagreeable information. This result would turn the free speech provisions upside down. The right to refrain from speaking must be limited to just that. The government cannot force a person to say anything about his beliefs and opinions, yet if a person chooses to speak about those beliefs, an accurate application of flag salute cases would hold that the first amendment guarantees the right to do so.

Yet, the *Jaffree* Court applies this analogy about the right to refrain from speaking to a voluntary public school prayer that rests with a teacher's discretion. According to *Jaffree*, because some students desire not to pray, it is not sufficient to establish that the period is a time of silence for meditation or prayer and that students may do whatever they choose. The Court takes the next step, never taken in the flag salute cases, and prohibits the activity altogether.[155] Thus, the claimed analogy has been abandoned. The objectors are not shielded from having to speak about their opinions or beliefs; they are shielded from an event. That event is the possibility (and only a possibility because there is silence, the exercise is voluntary, and the state cannot force anyone to disclose what they did during the period of silence) that some person in the same room at the same time, will engage in religious meditation or say a silent prayer to God. The Court has saddled itself with an inaccurate metaphor and an incorrect analogy.

II. Conclusion of United States Constitutional Section

It is not necessarily true that an inherent tension exists between the establishment and free exercise clauses which always causes conflict. Under Jefferson's view, free exercise is protected until it "breaks out" and threatens the peace, safety, and good order of society. Jefferson's view, shared by others of his time, establishes wide limits on the free exercise right.

The conflict between the clauses most frequently results from the *Everson* Court's misinterpretation of the establishment clause. Under that interpretation, when the establishment clause is construed to mean that government cannot have any association with religion, we have a proliferation of litigation and groping searches for tests, standards, and guides. If establishment is applied to

155. *Jaffree*, 472 U.S. at 52.

mean no preference among religions, as was its original intent, then government cannot set up a religion, nor can it prefer one over the other. Under this view, the establishment concerns would less frequently relate to free exercise concerns. Establishment cases would be easier to resolve and free exercise of religion would be enhanced. With this background on how matters of conscience and religious liberty are handled at the national level, let us now turn to the question of what role the states play in the development of an independent jurisprudence in these areas.

We will examine closely the history of the law of freedom of conscience and religious liberty in Georgia and will trace its expression and development through judicial opinions and current legislation. We will contrast briefly some religious liberty decisions in a few other states. This comparison will show that the experience in Georgia is representative of other states, and that a minority view among the states supports even greater establishment clause application than exists under current United States Supreme Court decisions.

III. State Constitutional Provisions, Statutes, and Decisions

A. The Constitution of Georgia

The history of the Georgia Constitution begins with the charter of the colony dated June 9, 1732. The charter contained a provision guaranteeing religious freedom for all except "papists."

> [T]here shall be liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit, or be resident within our said province, and that all such persons, except papists, shall have a free exercise of religion, so they be contented with the quiet and peaceable enjoyment of the same, not giving offence or scandal to the government.[156]

Although it is frequently assumed that the constitutional provisions which mention the liberty of conscience intend a broad liberty, this charter, in fact, provided for liberty of conscience only in the context of worshipping God. While no history exists of the proceedings of any constitutional conventions in Georgia, which would assist in interpreting these provisions,[157] the existence of similar

156. W. McElreath, A Treatise on the Constitution of Georgia 223 (1912).

157. Although some commentators discuss the general social and political circumstances surrounding the Georgia constitutional conventions, none provide or suggest the existence of any record of proceedings or supporting documentation to assist with the interpretation of the guarantee of freedoms typically found in a state bill of rights.

provisions in other jurisdictions supports this view.[158]

Building on the charter, the first constitution in Georgia was adopted in 1777. This constitution contained a guarantee of freedom for the free exercise of religion.[159] Reflecting an apparent concern for religious domination of politics, the 1777 constitution prohibited clergy from membership in the legislature.[160] With minor changes in wording, these provisions were incorporated into the constitution of 1789.[161] The prohibition against clergy membership in the legislature was, however, not included in the constitution of 1798, nor has it appeared since.

The constitution of 1798 contained one comprehensive provision on religious liberty:

> No person within this State shall, upon any pretence, be deprived of the inestimable privilege of worshipping God in a manner agreeable to his own conscience, nor be compelled to attend . . . worship . . . nor . . . be obliged to pay [taxes in support of a religion]. . . . No one religious society shall ever be established in this State, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles.[162]

This broad statement recognized a religiously-based freedom of conscience and freedom from compulsion to attend services or pay for any religious ministry. It also reflected the first expressions of establishment principles (based on preference concepts) and protection of rights against infringement because of religious beliefs.

See A. SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA 1732-1968 (1970); A. SAYE & C. HILKEY, THE CONSTITUTIONAL LAW OF GEORGIA, CASES AND COMMENTS (1952); E. WARE, A CONSTITUTIONAL HISTORY OF GEORGIA (1947).

158. By 1783 nine states had adopted revolutionary declarations or constitutions that contained language similar to the language in the Georgia Charter dealing with a limited scope of freedom of conscience. These states are New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, New York, Vermont, and New Hampshire. *See* B. SCHWARTZ, *supra* note 136, at 236, 260, 264, 277, 287, 312, 319, 375.

159. GA. CONST. of 1777, art. LVI.

160. *Id.* art. LXII. de Tocqueville suggests the clergy prohibition was an expression of mutual sentiment. In contrast with his experience in France where he had seen "the spirits of religion and of freedom almost always marching in opposite directions," in the United States he "found them intimately linked together in joint reign over the same land." Even in the face of this apparent harmony of societal objectives, the religious leaders did not pursue direct political involvement. De Tocqueville states: "I found that most of them seemed voluntarily to steer clear of power and to take a sort of professional pride in claiming that it was no concern of theirs." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 295-96 (J. Mayer trans. 1969) [hereinafter DE TOCQUEVILLE].

161. GA. CONST. of 1789, art. IV, § 5 and art. I, § 18.

162. GA. CONST. of 1798, art. IV, § 10.

The constitution of 1861 contained the first expressly identified Bill of Rights.[163] This Bill of Rights is attributed largely to the work of Thomas R. R. Cobb, who presented a Declaration of Fundamental Principles to the constitutional convention.[164] The provision relating to religion was shortened to state that "[n]o religious test shall be required for the tenure of any office; and no religion shall be established by law; and no citizen shall be deprived of any right or privilege by reason of his religious belief."[165]

The constitution of 1865 modified the religion provision and omitted the establishment language when it provided, "Perfect freedom of religious sentiment be and the same is hereby secured, and no inhabitant of said State shall ever be molested in person or property, nor prohibited from holding any public office or trust on account of his religious opinions."[166]

In the constitution of 1868 the religion provision was expressed in language which has essentially been carried forward to the present Georgia Constitution. The 1868 language repeated that of 1865 and added the following phrase: "[B]ut the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the people."[167]

The constitution of 1877 was the fourth constitution for the State of Georgia during a short sixteen year period. A significant change in this constitution separated "religious" and "conscience" oriented provisions into three paragraphs in language which, except for grammatical improvement,[168] is used today. The free exercise provision, although entitled "Freedom of Conscience," was specifically limited to the worship of God. It provided: "All men have the natural and inalienable right to worship God, each according to the dictates of his own conscience, and no human authority should, in any case, control or interfere with such right of conscience."[169] The restriction against interference applied to "human authority," recognizing a spiritual authority to which the citizens may give allegiance. This provision is found in the present

163. GA. CONST. of 1861, art. I.

164. A. SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA 1732-1968, at 244 (1970).

165. GA. CONST. of 1861, art. I, ¶ 7.

166. GA. CONST. of 1865, art. I, ¶ 5.

167. GA. CONST. of 1868, art. I, § 6.

168. GA. CONST. of 1877, art. I, § 1, ¶¶ 12-14.

169. *Id.* at ¶ 12. Identical provisions were in the 1945 constitution in art. I, § 1, ¶ 12, and in the 1976 constitution in art. I, § 1, ¶ 2.

Georgia Constitution in remarkably similar language: "Each person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience; and no human authority should, in any case, control or interfere with such right of conscience."[170]

Another provision in the 1877 constitution entitled "Religious opinions, etc.," carried forward the 1868 provision, but omitted the first clause relating to freedom for religious sentiment.[171] This provision is in the present constitution in the following form: "No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state."[172] In contrast to the free exercise clause in the first amendment,[173] this provision assured protection against molestation or disability based on religious beliefs and established specific limits on religious activity.

The constitution of 1877 resurrected an establishment clause which previously had been included only in the 1798 constitution. It provided: "No money shall ever be taken from the public Treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution."[174] In 1983 this provision was modified slightly: "No money shall ever be taken from the public Treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution."[175]

With the ratification of the 1877 constitution, the language regarding religious liberty was essentially fixed in Georgia. Consequently, the cases and materials which construe Georgia constitutional provisions interpret religious liberty provisions which have remained basically unchanged since that date.

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170. GA. CONST. art. I, § 1, ¶ 3.

171. GA. CONST. of 1877, art. I, § 1, ¶ 13.

172. GA. CONST. art. I, § 1, ¶ 4. The 1945 constitution contained this provision in art. I, § 1, ¶ 3. In the 1976 constitution it is found in art. I, § 1, ¶ 3.

173. *See supra* text accompanying note 12.

174. GA. CONST. of 1877, art. I, § 1, ¶ 14.

175. GA. CONST. art. I, § 2, ¶ 7. The 1945 constitution contained this provision in art. I, § 1, ¶ 14. In the 1976 constitution it is found in art. I, § 2, ¶ 10.

B. Georgia Cases and Interpretations

The cases in Georgia which interpret the religion provisions of the constitution fall into five broad categories: (1) religious activities inside the classroom; (2) interference with the health, safety, and rights of others; (3) furnishing services to public agencies; (4) use of public funds; and (5) church authority over members.

1. Religious Activities Inside the Classroom

The previously mentioned 1922 decision of the Georgia Supreme Court in *Wilkerson v. City of Rome*,[176] is the best known and most comprehensive case available in Georgia's judicial history of religious freedom. The facts of the case are simple and present a straightforward problem. The court was asked to decide whether a city ordinance may require the school board (through the principals of each school) to read aloud the King James version of the Bible and pray publicly in the local schools. With one dissent, the court agreed that it could.

The court summarized the three relevant provisions of the Georgia Constitution as declaring three distinct principles: "(1) [f]reedom of religious conscience; (2) freedom of civil status; and (3) freedom from taxation for sectarian purposes."[177] The assertion of these principles was based upon a substantial, although by no means exhaustive, analysis of the source material and intent behind these provisions. The court's analysis included a review of the charter of the colony, relevant cases from other states (in view of the absence of Georgia authority), and quotes from Roger Williams, George Washington, Abraham Lincoln, Daniel Webster, Benjamin Franklin, and Salmon P. Chase.[178]

The court concluded that the source of the Georgia provisions, and similar provisions used by other states and the federal government, was the religion provision of the Virginia Bill of Rights authored by Patrick Henry (June 12, 1776) and the Virginia Statute of Religious Liberty authored by Thomas Jefferson in January, 1786.[179] Henry's view of government and religion is well known; he drafted a proposal in the Virginia Legislature to provide for state support of religion.[180] Henry's actions prompted James Madison to

176. 152 Ga. 762, 110 S.E. 895 (1922).
177. *Wilkerson*, 152 Ga. at 766, 110 S.E. at 897.
178. *Id.* at 767-71, 110 S.E. at 898-900.
179. *Id.* at 772, 110 S.E. at 900.
180. DOCUMENTS OF AMERICAN HISTORY, *supra* note 50, at 125.

write his "Memorial and Remonstrance Against Religious Assessments, 1785" and Jefferson to draft the Virginia Statute of Religious Liberty. As seen in the previous discussion of the "wall of separation" theory,[181] Jefferson's views are often quoted, but rarely with accuracy. The court cited Schofield, a constitutional law commentator, who gave one of the more accurate assessments of Jefferson's views: " 'Jefferson's statute was not aimed at the Christian religion; it draws a clear line between the clergy and religion; it divorced the church from the state, but not the state, i.e., the people, from the Christian religion.' "[182]

The court developed a concise working statement of the Georgia religion provisions, which was based on an accurate analysis of history and an authoritative finding of intent. The holding that "the state has never intended to promote an unreligious or unchristian policy,"[183] is not surprising even today. The court concluded that "[t]he mere listening to the reading of an extract from the Bible and a brief prayer . . . would seem far remote from such interference [with the right to worship God according to the dictates of one's own conscience],"[184] when there would be "no instruction"[185] and upon written request a child could be "excused from attendance."[186]

Although the court correctly framed the issues before it and carefully analyzed the relevant history, it is regrettable that the court did not apply its reasoning in a way which would appear to be more sensitive to the worship of God as viewed from the perspective of various religious sects and creeds. The ordinance required school principals to conduct what can only be described as a worship service. Because of this requirement this ordinance could have been voided as governmental preference to Protestants. If reading holy writings and praying to Almighty God is not worship, one is challenged to know what does constitute worship. Under the no preference view of establishment clause interpretation, the court could have voided the requirement that readings must be from a specified version of the Bible. Such a holding might have encouraged readings from a broader spectrum of religious writings

181. *See supra* notes 99-102, 139-49 and accompanying text.

182. *Wilkerson*, 152 Ga. at 771, 110 S.E. at 900 (citation omitted).

183. *Id.* at 773, 110 S.E. at 901. *See also* Divine, *Freedoms of the First Amendment in Georgia*, 15 GA. B.J. 405, 411 (1952) (discussing the *Wilkerson* holding).

184. *Wilkerson*, 152 Ga. at 773-74, 778-79, 110 S.E. at 901, 903.

185. *Id.* at 778-79, 110 S.E. at 903.

186. *Id.* at 774, 110 S.E. at 901.

and provided an example of how the state could be involved with encouraging free exercise in a non-discriminatory manner. If one of these suggested approaches had been followed, there may have been less criticism directed toward free exercise issues in subsequent years.

In response to objections that the readings from a King James version of the Bible constituted discrimination against members of the Roman Catholic and the Jewish faiths and was a violation of the constitutional clause prohibiting use of taxes for sectarian purposes, the court concluded: "The mere reading of extracts from the New Testament or the Bible in the public schools cannot in any legitimate sense be considered as an appropriation of public moneys to the support or establishment of a system of religion or a sectarian institution."[187] It is regrettable the court did not recognize that a particular version of scripture could indicate a preference among sects. Thus, the *Wilkerson* opinion provides an excellent historical background, but failed to show an appropriate sensitivity to non-Protestant religious views. Although excellently crafted, the court's decision is disappointing.

Wilkerson was relied upon in subsequent decisions. For example, in *Leoles v. Landers*,[188] a religious liberty objection to mandatory flag salutes was rejected. The Georgia Supreme Court reasoned that the patriotic ceremony was a reasonable regulation of a public educational institution, and that the flag salute requirement must be obeyed by those choosing to avail themselves of a public education. If the state can force a school board to conduct worship services, then a school board can force a student to participate in a brief ceremony showing respect to the government.[189]

2. *Interference with the Health, Safety, and Rights of Others*

A religiously-based free speech issue arose from an ordinance of the City of Griffin which required written permission from the city manager to distribute literature within the city limits. In *Coleman v. City of Griffin*,[190] the Georgia Court of Appeals held the ordinance did not violate the state constitutional provision guaranteeing freedom of conscience in the worship of God. Citing other authorities for support of this proposition, the court held:

187. *Id.* at 777-78, 110 S.E. at 902-03.
188. 184 Ga. 580, 192 S.E. 218 (1937).
189. *Leoles*, 184 Ga. at 585-87, 192 S.E. at 221-22.
190. 55 Ga. App. 123, 189 S.E. 427 (1936).

> "Religious liberty does not include the right to introduce and carry out every scheme or purpose which persons see fit to claim as a part of their religious system. No one can stretch his liberty so as to interfere with that of his neighbor, or violate police regulations or the penal laws of the land, enacted for the good order and general welfare of all the people. Liberty founded by the fathers was not license unrestrained by law."[191]

Additionally, the court stated: "It matters not that his belief was a part of his professed religion; it was still belief, and belief only."[192] In this statement the court recognized a critical distinction which must be made in a republican democracy, namely, that conduct based on religion and other beliefs may be restrained as secondary to the primary objectives of government. However, as in *Wilkerson*, the Georgia court accurately focused on the conceptual problem before them, but failed to approach those concepts correctly. We might ask, what undue license was taken by Coleman which threatened the good order and general welfare? How did Coleman assert his liberty in such a way so as to interfere with the liberty of others? Is there any valid comparison between the asserted social interest in *Coleman* and the interest against polygamy in *Reynolds*, which the court cited as an analogy?[193] In a subsequent federal action the ordinance was found to be "invalid on its face," as a violation of the free speech provisions in the first amendment.[194] Perhaps the *Coleman* court was incorrect in its analysis because the defense relied so heavily on free exercise arguments. Had strong free speech arguments been asserted in defense, perhaps the *Coleman* outcome ultimately would have been different.

Apparently learning from *Coleman* and *Lovell*, the City of Moultrie adopted an ordinance which prohibited all literature distribution in the city during certain congested hours on Saturdays. In *Jones v. City of Moultrie*,[195] plaintiff sought to enjoin the enforcement of the ordinance based on violations of the Georgia religious liberty provisions. The supreme court reviewed the purpose of these guarantees and evaluated the purpose of the ordinance in

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191. *Coleman*, 55 Ga. App. at 128, 189 S.E. at 430 (quoting McMaster v. State, 21 Okla. Crim. 318, 207 P. 566 (1922)). .

192. *Id.*

193. *See id.* at 127-28, 189 S.E. at 429-30 (religious belief does not justify breaking the law).

194. Lovell v. City of Griffin, 303 U.S. 444 (1938).

195. 196 Ga. 526, 27 S.E.2d 39 (1943).

light of those constitutional provisions.

> While there is no power to control what a person may believe about religion or the type of religion he may adopt or profess, yet there is a power under the law to limit his acts, even though to do such acts may be part of his religious belief. The constitutional guarantee of the exercise of religious freedom does not extend to acts which are inimical to the peace, good order, and morals of society. . . . A person's right to exercise religious freedom, which may be manifested by acts, ceases where it overlaps and transgresses the rights of others. Every one's rights must be exercised with due regard to the rights of others.[196]

Keeping these principles in mind, the court held that because "[s]treets belong to the general as well as the local public; [the city has a] . . . duty to keep them in safe and suitable condition for the passage of persons and transportation of commodities."[197] The next year the court of appeals had the opportunity to review the conviction of a person who violated the Moultrie ordinance. The conviction was, of course, upheld.[198]

These principles were addressed again in two cases in 1951, when defendants contended their illegal conduct was justified as free exercise of religion. In *Brinkman v. City of Gainesville*,[199] the conviction of the appellant for operating a loud speaker in violation of an ordinance was affirmed, primarily based on the *Jones* rationale.[200] Next, in *Anderson v. State*,[201] some parents refused, on religious grounds, to comply with a school board requirement to have their children immunized against certain diseases. The children were refused entry to the school, and the parents were convicted of failing to have their children enrolled in school. In addition to the *Jones* principles, the court outlined further limits on religious freedom:

> Liberty of conscience is one thing. License to endanger the lives of others by practices contrary to statutes passed for the public safety and in reliance upon modern medical knowledge is another. The validity of the statute is not questioned, and the wisdom of the legislative enactment is not a matter for the

196. *Jones*, 196 Ga. at 530-31, 27 S.E.2d at 42.
197. *Id.* at 531, 27 S.E.2d at 43 (citations omitted).
198. Ferguson v. City of Moultrie, 71 Ga. App. 15, 29 S.E.2d 786 (1944).
199. 83 Ga. App. 508, 64 S.E.2d 344 (1951).
200. *Brinkman*, 83 Ga. App. at 515, 64 S.E.2d at 349.
201. 84 Ga. App. 259, 65 S.E.2d 848 (1951).

decision either of this court or of any individual citizen.[202]

The court maintained that absent a specific statutory exemption, even the religious must be subject to the commands of the legislature, and the relative wisdom of particular legislation is not a proper subject either for the courts or litigants.[203]

In *Rose Theatre Inc. v. Lilly*,[204] the court upheld the state's Sunday closing law, demonstrating the extent to which statutes, which may be religiously based, may constitutionally affect businesses. In that case, the Georgia Supreme Court held that the operators of a theatre charged with violating the statute had not substantiated their assertions that the statute was vague and repugnant.

The right of parents to avoid medicine and medical treatment for minor children, based on religious beliefs, has not been addressed by Georgia courts. One commentator argues that Georgia does not recognize such an exemption and thus, parents are liable for such actions.[205] The principal authority for this commentator's position is found in *Prince v. Commonwealth of Massachusetts*.[206] In that case, the Court did not resolve this question in its holding, but merely addressed it in dicta stating "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[207]

3. *Furnishing Services to Public Agencies*

The problem of the establishment of religion arose when public funds were directed to religious organizations providing services to the public. In *Bennett v. City of LaGrange*,[208] the city contracted

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202. *Anderson*, 84 Ga. App. at 264, 65 S.E.2d at 852.

203. *Id.* at 259, 65 S.E.2d at 848.

204. 185 Ga. 53, 193 S.E. 866 (1938).

205. Baldwin, *Religious Liberty versus Compulsory Medical Attention*, 22 GA. B.J. 558 (1960).

206. 321 U.S. 158 (1943).

207. *Prince*, 321 U.S. at 166-67 (1943) (citation omitted). The *Prince* language raises health-oriented liability questions that are significant to the present crisis concerning Acquired Immune Deficiency Syndrome (AIDS). If a parent may not use religion to justify withholding medical treatment, may the state assert limitations on a carrier of a deadly communicable disease who asserts civil liberties or "lifestyle" as a justification? Under the *Prince* authority and Baldwin's argument, such an individual may face liability under tort concepts. Given current medical evidence that the disease is always fatal, there may be other liability as well.

208. 153 Ga. 428, 112 S.E. 482 (1922).

with the Salvation Army to provide certain charity services at cost. The Georgia Supreme Court declared the agreement void on the grounds that the city had given direct support to a particular religious group and aided the group in implementing one of its primary religious objectives.[209] Two unofficial opinions by the Georgia Attorney General suggested that the *Bennett* authority applied in other contexts. The first opinion, addressed to the United States House of Representatives Committee on Education and Labor, suggested that "a contract for goods or services between a public elementary or secondary school and a non-public sectarian school" would violate Georgia's religious liberty provisions.[210] In the second opinion, a county was advised that a contract with a branch of the YMCA to furnish recreational facilities would also violate this provision.[211] These advisory, unofficial opinions, however, are not precedent. Furthermore, in *Bennett* the court specifically found that the Salvation Army was a religious organization, therefore, a similar finding would be a prerequisite to applying the *Bennett* authority in a particular factual context.

4. Use of Public Funds

The first Georgia case addressing the constitutionality of appropriating public funds "directly or indirectly" in aid of a religious organization turned on the court's interpretation of legislative intent in providing churches exemption from street assessments. At issue in *Trustees of The First Methodist Episcopal Church, South v. City of Atlanta*,[212] decided in 1886, was a statute which authorized municipalities to make assessments against real property adjoining streets to pay for street improvements. The church failed to pay the assessments and filed suit to enjoin the subsequent attempt by the city to have the marshall sell the church property pursuant to a writ of execution. In reviewing the legislation, the Georgia Supreme Court determined that the statute was not intended to supersede the existing tax exemption granted religious institutions.[213] The respite from sharing the cost of street improvements was short lived, however, because in 1891 the issue again came before the court, and the court reversed its previous position

209. *Bennett*, 153 Ga. at 437, 112 S.E. at 487 (1922).
210. 1969 Unoff. Op. Att'y Gen. 161, 162.
211. 1969 Unoff. Op. Att'y Gen. 174.
212. 76 Ga. 181 (1886).
213. *Methodist Episcopal*, 76 Ga. at 188.

on the legislative intent behind the statute authorizing street assessments.[214] In this instance, the City of Atlanta attempted to tax the First Presbyterian Church. In response to the church's claim that the legislature's intention to exempt religious organizations from taxes could be found by analogy and implication, the court stated that it found no express provision in the statute that created the claimed exemption.[215]

Additionally, the court focused on the constitutional prohibition against using state funds, either directly or indirectly to support a church.[216] The court found that under this provision the state could "pay nothing to the church."[217] Thus, assuming there was no issue of public funds directly supporting the church, the court addressed the issue of whether the legislature intended to exempt church property from the assessments. The court reasoned that because another state statute required uniformity in taxation of property in the same class,[218] no specific property, including church property, was exempt unless the statute authorizing the assessment specifically provided an exemption. The statute at issue provided no exclusion, therefore, the court found that church property was not exempt from the tax.[219]

In spite of the differences expressed in these opinions about the legislature's intent in enacting the street assessment measure, each court reached similar conclusions regarding the history and intent of the religious liberty provisions in Georgia's constitution. Thus, the conclusions provide insight into the meaning of these constitutional provisions. In *Methodist Episcopal Church* the court stated, "the policy of the state is to encourage and advance religion."[220] The rationale for this view is similar to the rationale supporting the views voiced one hundred years earlier in the debates surrounding the adoption of the United States Constitution and the first amendment.[221] The court in *Methodist Episcopal Church* elaborated:

> The duties enjoined by religious bodies and the enforcement

214. City of Atlanta v. First Presbyterian Church, 86 Ga. 730, 739, 13 S.E. 252, 255 (1891).

215. *Id.*

216. GA. CONST. of 1877, art. I, § 2, ¶ 4.

217. *First Presbyterian Church*, 86 Ga. at 739, 13 S.E. at 255.

218. *Id.*

219. *Id.*

220. Trustees of the First Methodist Episcopal Church, South v. City of Atlanta, 76 Ga. 181, 191 (1886).

221. *See supra* notes 125-39 and accompanying text.

> by them of the obligations arising therefrom, though beyond the power or scope of the civil government, . . . furnish a sure basis on which the fabric of civil society can rest, and without which it could not endure. Take from it these supports, and it would tumble into chaos and ruin . . . .
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> . . . .
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> . . . The manifest object of the provision was to prevent any appropriation or subsidy that might look even remotely to the establishment of a state religion . . . .[222]

Additionally, the court stated:

> "But . . . the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises . . . . Undoubtedly the spirit of the constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any one of these things does not become unconstitutional simply because of its susceptibility to abuse." Our constitution, while it takes away the temptation and power to make such discrimination either in favor of or against any one religious denomination or sect, leaves it open to the legislature to encourage religious instruction . . . .[223]

On four occasions, the Attorney General of Georgia addressed the issue of using public funds for establishment oriented purposes. An unofficial opinion, addressing the use of public school buses to transport children to private schools, focused on the statutory limits imposed on public school systems rather than on the constitution's religion provisions. The opinion stated: "The transportation system operated by the common schools of Georgia is not and can not be operated as a public transportation system. It can only be operated in connection with the common schools of the State."[224]

On the next occasion, the Attorney General directly faced the question of the constitutionality of government assistance to a religious organization. In that situation, prison labor had been used to clean church grounds and a cemetery adjacent to a prison. The opinion noted that the Georgia constitutional provisions, prohibiting state funds to aid religious institutions "directly or indirectly," were "intended to have a stronger application than the Federal

222. *Methodist Episcopal*, 76 Ga. at 192-96.
223. *Id.* at 196-97 (quoting T. COOLEY, CONSTITUTIONAL LIMITATIONS 470-71 (1868)).
224. 1945-47 Unoff. Op. Att'y Gen. 222, 223.

[provisions]."[225] The Attorney General concluded that the use of prison labor violated both the Georgia and federal Constitutions because "the State assistance is given directly to a church itself. The benefit to religion is direct and not incidental."[226]

The next opinion interpreting the religion provisions of the Georgia Constitution addressed the issue whether the State Board of Corrections could "expend state funds for the employment of chaplains and the construction and maintenance of chapels in the various prisons . . . and . . . legally permit religious organizations to conduct services in such chapels."[227] Relying principally on the authority of *Zorach v. Clausen*, which recognized the " 'common sense of the matter,' "[228] the Attorney General stated:

> In the present situation, facilities and opportunities are merely made available to prisoners which otherwise would be denied them solely by reason of the state's action in confining them. There is no direct aid given to the church. The entire arrangement is for the benefit of the prisoners. . . . The providing of chapels and chaplains merely seeks to insure that state imprisonment shall not be permitted to interfere with the prisoner's free exercise of his religion.[229]

In the fourth opinion, the Attorney General concluded that the State Board of Education was not barred from administering a program that the federal government had created to provide books and materials for the use of students and teachers in both public and private schools.[230] In reaching this conclusion, the Attorney General found it significant that the program was funded with federal funds without requiring matching state funds.[231]

More recently, the Georgia Supreme Court considered the use of public funds to support religion in *Bradfield v. Hospital Authority of Muscogee County*.[232] In *Bradfield*, the plaintiff objected to the building of a county-owned hospital which would then be leased to and operated by a religious organization. In ruling on the constitutionality of this action, the Georgia Supreme Court first determined that funds to build the hospital would be generated from

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225. 1960-61 Op. Att'y Gen. 349, 351.
226. *Id.* at 353.
227. 1960-61 Unoff. Op. Att'y Gen. 361, 361.
228. *Id.* at 362 (quoting Zorach v. Clausen, 343 U.S. 306, 312 (1952)).
229. *Id.*
230. 1965 Op. Att'y Gen. 4.
231. *Id.*
232. 226 Ga. 575, 176 S.E.2d 92 (1970).

the sale of revenue anticipation certificates issued by the hospital authority. Next, the court concluded that by law this type of debt was not considered an obligation or debt of the state because the hospital authority is not a political subdivision of the state. Therefore the use of public funds was not in violation of the establishment provisions.[233]

A federal court addressed the question of using state funds to buy new religious markers for graves when an abandoned cemetery was discovered in the right of way of a highway project. The court found no establishment clause violation, state or federal, because the state was merely acting as a caretaker. Futhermore, the decision on the type of marker used did not rest with the state, thereby eliminating any state role in advancing or inhibiting religion.[234]

In summarizing these cases dealing with the use of public funds to advance religion, a conclusion can be drawn that, absent an express provision, Georgia's policy is to encourage and advance religion. Thus, it appears that Georgia precedents allow more state participation in religious matters than is currently allowed under United States Supreme Court interpretations of the establishment clause of the first amendment.

5. *Church Authority Over Members*

This section will focus on the relationship of members of a religious organization to each other and to the organization. Additionally, the role of civil authorities in resolving organizational disputes will be addressed.

In *Crosby v. Lee,*[235] the Georgia Court of Appeals reviewed a defamation action brought by a former church member against the church association and certain individual members. In holding that the alleged defamatory communication was not a subject for the courts to consider, the court stated:

> "All questions relating to the faith and practice of the church and of its members belongs to the church judicatories to which the members have voluntarily subjected themselves, since, when a person becomes a member . . . he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are involved. So long as a professed creed is not subversive of the peace and good order of society, it is not

233. *Bradfield*, 226 Ga. at 586-88, 176 S.E.2d at 101.
234. Birdine v. Moreland, 579 F. Supp. 412, 417 (N.D. Ga. 1983).
235. 88 Ga. App. 589, 76 S.E.2d 856 (1953).

> within the province of any department of the government to settle differences in creeds or to determine what ought or ought not to be a fundamental religious belief."[236]

Absent an applicable law, a similar conclusion is reached when property rights in a religious organization are disputed. When "neutral principles of law," such as deeds, statutes, and organizational charters or constitutions address the question of title, those laws will be applied in settling church property disputes.[237] If "neutral principles of law" are not available to resolve these conflicts, the Georgia courts follow the direction of the United States Supreme Court and abstain from resolving church disputes involving ecclesiastical matters.[238] In *Jones v. Wolf*, the Georgia Supreme Court applied Georgia law to decide a land title dispute between a local congregation and its former general church.[239] The court found that title vested in the local congregation when there was no "more than a mere connectional relationship" between the local congregation and the general church.[240]

In addition to disputes concerning property and liability, another potential area for dispute arises from the efforts of many religious organizations to offer "counseling" services as part of a broad outreach program. Although no Georgia court has addressed this issue, it has been litigated in California. In *Nally v. Grace Community Church*,[241] a person participating in a church counseling program committed suicide after attending counseling sessions. An ensuing complaint based on clergy malpractice was dismissed on the grounds that the counseling did not cause the suicide.[242] A related matter concerns the clerical testimonial privilege, the broad protection granted religiously based communication.[243] This privilege was later restricted to communication made during spiritual

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236. *Crosby*, 88 Ga. App. at 593-94, 76 S.E.2d at 859 (quoting Stewart v. Jarriel, 206 Ga. 855, 855, 59 S.E.2d 368, 370 (1950)).

237. Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322 (1976).

238. Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

239. 241 Ga. 208, 243 S.E.2d 860 (1978).

240. *Jones*, 241 Ga. at 211-12, 243 S.E.2d at 864. *See also* Reddick v. Jones, 251 Ga. 195, 304 S.E.2d 389 (1983) (church's charter controls on disputed issues of management); Sapp v. Callaway, 208 Ga. 805, 69 S.E.2d 734 (1952) (courts will avoid interferring in management of local churches).

241. Nally v. Grace Community Church, No. NCC 18668-B (Super. Ct. L.A. County, May 6, 1985).

242. *Id.*

243. Coleman v. Lee, 88 Ga. App. 589, 591, 76 S.E.2d 856, 859 (1953) (Townsend, J., concurring) (discussing clerical privilege).

counseling or profession of religious faith.[244]

6. *Summary of Georgia Cases and Interpretations*

The establishment clause language in the Georgia Constitution is facially more restrictive than the corresponding federal provision. However, from the limited number of cases interpreting the religion provisions in the state constitution we find that the Georgia courts have recognized the value of religious belief. Accordingly, efforts have been made to promote religion as an important part of the state's well-being. Thus, the facially more restrictive constitutional language in Georgia has been interpreted to allow greater interaction between church and state. In fact, the Georgia interpretations appear to be more in harmony with the original intent of the religion provisions in the federal Constitution.

Georgia cases interpreting the free exercise clause attempt to balance individual religious-based rights with other rights, in vivid contrast with the asserted position of the United States Supreme Court that religious rights are in a "preferred" position.[245] Thus, it could be argued that because of the application of the first amendment to the states through the fourteenth amendment, the United States Constitution would afford more protection to religious liberties than would the Georgia provisions, as these provisions have been interpreted by Georgia courts.[246]

Acknowledging the preemption of the field by the United States Supreme Court, it is doubtful that an independent jurisprudence recognizing expanded religious liberties could develop in Georgia. However, if cases addressing religious issues were more frequently presented in the state law context and were evaluated with historical accuracy (as has been the case in Georgia), it might be possible for a state jurisprudence to develop in specific areas. One possibility, for example, is in the area of state court interpretation of statutes which either clarify or extend religious rights. With this possibility in mind, several statutes merit an examination.

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244. Jones v. Department of Human Resources, 168 Ga. App. 915, 310 S.E.2d 753 (1983). The liability of a religious organization to a person receiving counseling is discussed in an unpublished research memorandum by John P. Tucker, Jr., of Atlanta, with whom the author is Of Counsel.

245. The "preferred" right concept is supported in West Virginia State Board of Education v. Barnett, 319 U.S. 624, 639 (1943). Justice Frankfurter criticizes this characterization in his concurring opinion in Kovacs v. Cooper, 336 U.S. 77, 92-97 (1948) (Frankfurter, J., concurring).

246. This suggestion is also discussed in Divine, *Freedoms of the First Amendment in Georgia*, 15 GA. ST. B.J. 405, 416 (1952).

C. *Georgia Statutory Provisions*

A number of Georgia statutes address religion issues. For example, one statute provides that religious views may not be the basis for exclusion from the University of Georgia.[247] Another statute states that a person may refuse family-planning services (presumably for religious or any other reason) with no effect on the person's right to receive public assistance, public health services, or other public benefits.[248] In regard to church title disputes, the previously discussed cases are based on a statute which provides that "[t]he withdrawal by one part of a congregation from the original body or the uniting of a part of a congregation with another church or denomination is a relinquishment of all rights in the church abandoned."[249]

Three Georgia statutes address the role of religion in the work place. The first one is a part of the Fair Employment Practices Act which, among other provisions, prohibits discrimination based on religion.[250] Another statute protects the right of an employee working for an agency involved with family-planning services to refuse, for religious reasons, "the duty of offering family-planning services . . . ."[251] The third statute on this topic is the Common Day of Rest Act.[252] This statute directs employers to "make all reasonable accommodations to the religious, social, and physical needs of such employees so that those employees may enjoy the same benefits as employees in other occupations."[253] That statute also assures that businesses "provide the public with necessary benefits and services at all times, while at the same time protecting the lawful humanitarian, social, and religious rights of each individual."[254]

Finally, a Georgia statute makes it a misdemeanor to disrupt a "lawful meeting, gathering, or procession."[255] The law gives specific statutory protection in a free speech context to those who meet for

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247. O.C.G.A. § 20-3-65 (1987).
248. O.C.G.A. § 49-7-5 (1986).
249. O.C.G.A. § 14-5-43 (1982).
250. O.C.G.A. § 45-19-29 (1982).
251. O.C.G.A. § 49-7-6 (1986).
252. O.C.G.A. §§ 10-1-570 to -576 (1982).
253. O.C.G.A. § 10-1-573 (1982).
254. O.C.G.A. § 10-1-572 (1982). In contrast to this legislative provision requiring employers to make *reasonable accommodations* for employees who desire to observe a day of worship, the Supreme Court has declared unconstitutional a statute which imposed an absolute duty on employers to conform business practices to employees' religious practices. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).
255. O.C.G.A. § 16-11-34 (1984).

religious purposes.

Georgia's statutes are examples of practical legislation that protect religious liberties. Furthermore, these statutes recognize the historical role of religion in society.

D. Constitutional Provisions of Other States

We will now briefly review some religious liberty issues in other states. Although the historical development in Georgia was typical of many states, there are some intriguing differences in other states. Before examining the cases, a review of the development of the protection of religious rights in several states will be helpful.

The discussion of the history of constitutional protection for religious liberty in our country must begin with the experience of Virginia. George Mason was the principal drafter of the Virginia Declaration of Rights, which is dated June 12, 1776; but Article 16 of the Declaration was drafted by Patrick Henry[256] and provided:

> That Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.[257]

During the Revolutionary period eight other states followed the Virginia example and included a declaration or bill of rights as a preface to their constitutions. The four remaining original states drafted constitutions with no separate bill of rights; they included these provisions in the body of their constitutions.[258]

The New Jersey Constitution of 1776 was the first to recognize and implement the two-fold nature of religious liberty by guaranteeing the free exercise of religion and prohibiting state establishment of religion.[259] The pertinent articles provided:

> XVIII. That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience . . . .

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256. DOCUMENTS OF AMERICAN HISTORY, *supra* note 50, at 103. *See also* 2 B. SCHWARTZ, *supra* note 136, at 231-34 (discussing Virginia Declaration of Rights).

257. 2 B. SCHWARTZ, *supra* note 136, at 236.

258. *Id.* at 256.

259. *Id.*

> XIX. That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.[260]

This first expression of an establishment clause in a state constitution contains language which clearly states its intent. There can be no question that the object sought was avoiding preference and discrimination among the Protestant sects. The provision did, however, guarantee only the rights of Protestants. No one else, whether Catholic, Jew, or atheist, was protected.

The view that establishment clauses were intended to prohibit preference among religious denominations, rather than to create a "wall of separation" between church and state, is supported by the experience of other states in drafting similar provisions.[261] The New York Constitution of 1777 provided "that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind . . . ."[262] The Massachusetts Declaration of Rights, dated March 2, 1780, provided in its section of religious liberty: "And no subordination of any one sect or denomination to another shall ever be established by law."[263] The New Hampshire Bill of Rights, approved in October, 1783, incorporated the Massachusetts establishment language verbatim.[264] The policy against preference or establishment of particular religions continued after the Revolutionary War period. For example, the Indiana Constitution on June 10, 1816, contained this provision: "And that no preference shall ever be given by law to any religious societies, or modes of worship."[265]

The Georgia, Virginia, and New Jersey provisions were very typ-

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260. *Id.* at 260.
261. *Id.* at 260, 264, 341, 376.
262. *Id.* at 312.
263. *Id.* at 340-41.
264. *Id.* at 375-76.
265. 1 CONSTITUTION MAKING IN INDIANA 84-85 (C. Kettleborough ed. 1971).

ical of the early constitutions; like most state constitutions, they employed nearly identical language in their provisions protecting religious liberty. The original protections of the state constitutions may have had an earlier origin. For example, the Royal Charter of Rhode Island, dated July 6, 1663, contains this provision:

> No person within the said Colony, at any time hereafter, shall be in any wise molested, punished, disquieted or called in question, for any differences in opinions in matters of religion, and do not actually disturb the civil peace of our said Colony; but that all . . . may from time to time hereafter, freely and fully have and enjoy his and their own judgments and consciences, in matters of religious concernments . . . not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others.[266]

The Rhode Island Charter protected the individual against being "molested," a word later used in Georgia's and other state constitutions.[267] The American tradition has been to protect the freedom of conscience "in matters of religious concernments," but to place limits on religious liberty in order to prevent "civil injury."[268]

The religious freedom provisions of the state constitutions and their references to a duty owed to the Almighty Creator did not change during the century following the Revolution. In 1912 Professor Goddard reported that: "Almost every State constitution, in the preamble, refers to God, and most of them include the phrase, 'grateful to Almighty God.' And yet in every State Constitution provides for a full religious liberty [sic]."[269]

Professor Goddard discusses this summary of the contents of the state constitutional provisions regarding religious liberties, listing their five broad areas of prohibition: "(1) Any law respecting an establishment of religion; (2) Compulsory support, by taxation or otherwise, of religion; (3) Compulsory attendance upon religious worship; (4) Restraints upon the free exercise of religion according to the dictates of conscience; and (5) Restraints upon the expression of religious belief."[270] In discussing this list, Goddard ad-

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266. S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 169-70 (1972).

267. GA. CONST. of 1865, art. I, ¶ 5; 2 B. SCHWARTZ, *supra* note 136, at 279 (Maryland), 374 (New Hamsphire).

268. Thomas Jefferson further refined these limits. *See supra* note 49 and accompanying text.

269. Goddard, *The Law in the United States in its Relation to Religion*, 10 MICH. L. REV. 161, 168 (1912).

270. *Id.* at 169 (citation omitted).

dressed the same questions prevalent today: is the law to be indifferent to religion and is the attitude of the state to be one of complete neutrality? Goddard's answer to both questions is in the negative: "The state may not burden the citizen with the support of religion, but it may and does, on secular grounds, recognize and protect its voluntary observance by the citizens [because] religion is essential" to a civilized society.[271]

E. Statutes and Decisions of Other States

An examination of state court cases dealing with religious liberties reveals a broad, but not absolute, distinction between those cases decided before and those decided after the United States Supreme Court held the first amendment to be applicable to the states.[272]

For example, in New York in 1811, an indictment was upheld for blasphemous remarks against Christ,[273] and in 1822 a conviction in Pennsylvania was upheld for blasphemy against the Holy Scriptures.[274] Before the 1940's, Sunday closing laws were upheld in New York,[275] Missouri,[276] and Minnesota.[277] The nation's state courts were much more willing to protect religious values in the nation's first century and a half. This trend did not end until the Supreme Court became more involved in this area of the law.

Regarding religious exercises in public schools, Paulsen found that, as late as 1951, "the great majority of states permit the reading [of the Bible] as well as the prayer."[278] His conclusion is supported by various cases. For example, Maine required school children to attend religious exercises held in the lower schools,[279] and in Illinois, rules of chapel attendance were found to be "reasonable regulations for the inculcation of moral and religious principles."[280]

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271. *Id.*

272. The free exercise clause was held to be incorporated by the fourteenth amendment against the states in Cantwell v. Connecticut, 310 U.S. 296 (1940), and the establishment clause was held to be incorporated in Everson v. Board of Education, 330 U.S. 1 (1947).

273. People v. Ruggles, 8 Johns. 290, 295 (N.Y. 1811).

274. Updegraph v. Commonwealth, 11 Serg. & Rawle 393, 394 (Pa. 1822).

275. Lindenmuller v. People, 33 Barb. 548, 568-70 (N.Y. 1861).

276. State v. Ambs, 20 Mo. 214, 216-18 (1854).

277. State v. Weiss, 97 Minn. 125, 128-29, 105 N.W. 1127, 1128-29 (1906).

278. Paulsen, *supra* note 1, at 639.

279. Donahoe v. Richards, 38 Me. 379, 407 (1854).

280. North v. Board of Trustees, 137 Ill. 296, 305, 27 N.E. 54, 57 (1891).

A similar conclusion was reached by courts in Michigan,[281] Kentucky,[282] and Texas.[283]

The majority view allowing religious exercises in the schools was not universal, however. A Wisconsin decision,[284] for example, concluded:

> To teach the existence of a Supreme Being of infinite wisdom, power, and goodness, and that it is the highest duty of all men to adore, obey, and love Him, is not sectarian, because all religious sects so believe and teach. The instruction becomes sectarian when it goes further, and inculcates doctrine or dogma or concerning which the religious sects are in conflict.[285]

The Wisconsin court stated that the Bible tended to "inculcate sectarian ideas," contrary to the state constitution. Based on this conclusion, the court prohibited Bible readings in the public schools.[286] Thus, even as late as the turn of the century, the central question of the relationship of the constitutional religious provisions to the public school systems was not whether religious exercises would be allowable, but in what manner were they to be allowed. In deciding the issue, the Wisconsin court tacitly recognized that religious freedom included more than the protection of the rights of religious expression of the Protestant majority.

A similar discussion is found in *Lindenmuller v. The People*,[287] in which a New York court upheld a Sunday closing law. In upholding the law, the court articulated what today would seem to be a contradictory view. The court held that although Christianity is the recognized and virtually established religion of New York, "perfect civil and political equality, with freedom of conscience and religious preference, is secured to individuals of every other creed and profession."[288] The New York court's opinion illustrates the view that the existence of a dominant religious faith does not preclude tolerance of other religions.

A number of post-incorporation decisions dealt with different forms of public assistance to religion. Not surprisingly, many of

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281. Pfeiffer v. Board of Educ., 118 Mich. 560, 77 N.W. 250 (1898).
282. Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905).
283. Church v. Bullock, 109 S.W. 115 (Tex. 1908).
284. Weiss v. District Bd. of School Dist. No. Eight, 76 Wis. 177, 44 N.W. 967 (1890).
285. *Id.* at 193-94, 44 N.W. at 978.
286. *Id.* at 199, 44 N.W. at 980.
287. 33 Barb. 548 (N.Y. 1861).
288. Lindenmuller v. People, 33 Barb. at 562.

these decisions arose in the context of education. In Hawaii, the state supreme court addressed the same issue[289] that the Georgia Attorney General addressed in his unofficial opinion dated April 4, 1947.[290] The Georgia opinion stated that the public school transportation system could not be used for private school students. Similarly, the Hawaii court concluded that state funds could not be used indirectly to aid religion.[291]

On the question of state administration of federal funds to aid private and public schools, the Missouri Supreme Court held that using these funds for private religious schools provided a benefit to private schools in violation of the Missouri Constitution.[292] Missouri's approach differed from that expressed in the 1965 opinion of the Georgia Attorney General.[293] An Oregon statute authorizing public school boards to supply textbooks at no cost to students enrolled in religious schools[294] was found in violation of the Oregon Constitution.[295] In reaching this conclusion, the Oregon court stated that it was required to follow the precedent of the United States Supreme Court expressed in *Everson v. Board of Education*.[296]

Yet, in *Everson*, while announcing the absolute separation of church and state formula, the Court approved the reimbursement to parents of their transportation costs to send their children to religious schools.[297] The Oregon court[298] noted that the expenditure in *Everson* was upheld on the grounds that protection of school children from traffic hazards was for the general welfare regardless of the school attended.

Also expanding upon the *Everson* rationale, a Washington state court held that the non-establishment provisions of the Washington Constitution were intended to have broader application than the federal provisions. Therefore, the court rejected a plan which would have permitted free use of the public transportation system

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289. Spears v. Honda, 51 Haw. 1, 449 P.2d 130 (1969).

290. *See supra* note 224 and accompanying text.

291. Spears v. Honda, 51 Haw. at 15, 449 P.2d at 138; 1945-47 Op. Att'y Gen. 222, 223.

292. Mallory v. Barrera, 544 S.W.2d 556 (Mo. 1976).

293. 1965 Op. Att'y Gen. 4.

294. Dickman v. School Dist. No. 62, 232 Or. 238, 366 P.2d 533 (1961).

295. *Id.* at 244, 366 P.2d at 537.

296. Everson v. Board of Educ., 330 U.S. 1 (1947).

297. *Id.* at 7.

298. *Dickman*, 232 Or. at 251, 366 P.2d at 540-41.

by church school children.[299]

In South Dakota an interesting issue regarding public assistance to religious organizations developed when a statute was passed making all accredited private or public high schools eligible for membership in the state interscholastic activities association.[300] The court acknowledged the possibility of legislative direction over private schools pursuant to the police power, but held that the minimal involvement did not constitute "aid to a sectarian school."[301]

A Washington state statute was invalidated because it made public financial aid available to disadvantaged and needy students enrolled in post-secondary education institutions, including sectarian schools.[302] Ten years later the issue was still unresolved in Washington. In 1984, the state supreme court concluded that a similar educational financial assistance plan for the visually handicapped pursuing education in the "professions, business or trades" could not be used to provide assistance to a handicapped private school student who intended to use the aid to "become a pastor, missionary, or youth director."[303] This Washington state decision was reversed by the United States Supreme Court which held: "In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State."[304]

Two decisions of the Arizona Supreme Court demonstrate an accommodation of religious activities by permitting the use of state funds and facilities for sectarian uses. In 1967, a "partially matching plan" was found acceptable. Under the terms of that plan, the state paid forty percent of the cost that a religious organization incurred in providing emergency services to destitute individuals and families.[305] The court found that the forty percent was part of the actual cost of the benefits received by needy persons and was not aid to the organization itself. The opinion contained a list of acceptable types of assistance that could be funded with public

299. Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949).

300. South Dakota High School Interscholastic Activities Ass'n v. St. Mary's Inter-Parochial High School, 82 S.D. 84, 141 N.W.2d 477 (1966).

301. *Id.* at 91, 141 N.W. at 480-81.

302. Washington State Higher Educ. Assistant Auth. v. Graham, 84 Wash. 2d 813, 815-18, 529 P.2d 1051, 1053-54 (1974).

303. Witters v. State Comm'n for the Blind, 102 Wash. 2d 624, 626, 689 P.2d 53, 55 (1984).

304. Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986).

305. Community Council v. Jordon, 102 Ariz. 448, 432 P.2d 460 (1967).

monies: "substitution of services," "value received theory," "full reimbursement plan," "less than cost doctrine," "aid," "child benefit theory," and "true beneficiary theory."[306] In reaching this conclusion, the court distinguished its decision from the *Bennett* decision in Georgia,[307] a "limited full reimbursement plan," in which assistance was funded by the state through the Salvation Army on an actual cost basis. This program was invalidated because it was determined that a portion of the total cost of services represented funds used by the Salvation Army to advance its religious missions.[308]

In the second of the Arizona cases,[309] the court approved leasing a major state university football stadium to a religious organization for a Billy Graham rally. The court concluded state property could be used by religious organizations in accordance "with the equal protection clause of the Fourteenth Amendment," when charged fair rental value and leased only on an occasional basis.[310]

The final state cases which will be reviewed in this article involve the legality of maintaining a cross on public property.[311] The California Supreme Court found that the maintenance of a cross on the Los Angeles City Hall was a violation of the state constitution because it was impracticable to provide, "comparable recognition of other religious symbols."[312] In contrast, the Oklahoma Supreme Court found no similar violation in the maintenance of a cross erected at the expense of the Oklahoma City Council of Churches at a fairgrounds owned by the city. The Oklahoma court found the city's expenses were "slight but continuing," and that the cross was in disrepair and located in such a commercial setting that it could hardly be said to benefit any religious purpose.[313]

IV. Conclusion of State Constitutional Section

A review of the decisions and interpretations of the state constitutions discloses a change which took place from the late 1940's through the 1960's. Before 1940, the decisions were similar to the

306. *Id.* at 452-55, 432 P.2d at 464-67.
307. Bennett v. City of LaGrange, 153 Ga. 428, 112 S.E. 482 (1922).
308. *Jordon*, 102 Ariz. at 453-54, 432 P.2d at 465-66.
309. Pratt v. Arizona Bd. of Regents, 110 Ariz. 466, 520 P.2d 514 (1974).
310. *Id.* at 469, 520 P.2d at 517.
311. Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).
312. *Id.* at 869, 587 P.2d at 665 (1978).
313. Meyer v. Oklahoma City, 496 P.2d 789, 791-92 (1972).

early Georgia cases. Religion was understood to mean Protestant Christianity, and later included other professions of faith in a Supreme Being. Worship could occur in public and was accommodated under the accepted view that government should encourage religion because it nurtured those values and character traits necessary for self-government. The purpose of the state establishment clauses was to assure that one sect or denomination was not preferred over others.

The post-1940 state cases demonstrate a level of ambiguity uncharacteristic in the earlier cases, yet they are not as uncertain and unpredictable as the federal cases. In these later state cases, there is the sense of fear of government being too close to religion, and that as a result, some element of state purity might be lost.

CONCLUSION

Two hundred years ago religion had much to fear from aggressive and dominating government, and our government had much to gain from salutary religious influences, if those influences were not allowed to develop into a national established religion funded by the national government. To further these goals, the first amendment was framed to advance a policy of nonpreference and nonestablishment. Some commentators suggest that the wall of separation theory, which provides the current basis for establishment clause analysis, may crumble over the next few Terms of the United States Supreme Court, and that a trend toward permitting more free exercise of religion will continue. As two commentators have noted: "Accommodation, after all, matches the nation's current political shift to the right, as well as White House and congressional efforts to lower the wall separating church and state."[314]

However, it is likely that this prediction will not come to pass, and the "wall" theory may continue to dominate establishment clause interpretations. The material reviewed in this article indicates that the interest in preserving the "wall" metaphor, or some similar device, may go much deeper than a simple change in direction of political winds, whether right or left. There is perhaps something more fundamental at issue, a matter of outlook or world view.

It is suggested that the expansive interpretation of the establishment clause under the "wall" theory provides a convenient mecha-

314. Reinersten & Vinson, *Florida's School Prayer Statute*, Wallace v. Jaffree *and a Crumbling Wall of Separation*, 60 FLA. B.J., March 1986, at 9.

nism to harness the influence of religion in society. Based upon our earlier analysis of the definitions of freedom and liberty, this harnessing appears to be an objective of many on the Court.

We have seen that the modern view of freedom and liberty is to maximize the range of choices to include as wide a spectrum as possible. Under this view, society is more "free" when the range of choices increases. This outlook puts pressure on the judiciary to create and allow choices which are assumed to be unduly restricted by other institutions of society.

In contrast to this view, we have discussed a religiously-based definition of freedom and liberty. Although religion was once viewed as necessary to establish character traits essential for self-government, that view may now be obsolete.

The historical basis of the Court's precedents run too deeply for mere political rhetoric or shifts in voting patterns to cause rapid change. The Court reflects a most serious debate underway within the nation about issues of national identity and the definition of a republican democracy. The debate also concerns the role of government in the daily lives of people: is freedom defined as the ability to choose among things or is freedom defined as transcendence over materiality; does liberty create an obligation for the government to seek out and remove restraints on independence or is liberty the right not to be physically restrained except for legal cause?

The debate will continue, and only when one approach more than the others offers answers to these questions will we see a similar response by the Court. However, mere transitions in politics will not make a significant difference in the way the Court resolves these issues. This response will occur only when society proposes and demands coherent approaches to the issues of religious liberty.

An insight from C. S. Lewis is appropriate in any discussion of the resolution of these issues. Lewis advocated learning from old books to avoid the chronological snobbery that succeeding generations are necessarily more wise than earlier ones. He advocated allowing "the clean sea-breeze of the centuries" to give us perspective on our own age.[315] In many ways we have failed to take advantage of the rich wisdom in our own heritage. Perhaps this heritage contains the soundest approach to the issue of the role of religion in society.

315. M. NOLL, THE SEARCH FOR CHRISTIAN AMERICA 146-47 (1983).